

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: AUTOMOTIVE PARTS
ANTITRUST LITIGATION

Case No. 12-2311

Hon. Marianne O. Battani

THIS RELATES TO:

8	In Re:	Wire Harness	2:12-cv-00101
	In Re:	Instrument Panel clusters	2:12-cv-00201
9	In Re:	Fuel Senders	2:12-cv-00301
	In Re:	Heater Control Panels	2:12-cv-00401
10	In Re:	Alternators	2:12-cv-00701
	In Re:	Windshield Wipers systems	2:12-cv-00901
11	In Re:	Starters	2:12-cv-01101
	In Re:	Ignition Coils	2:12-cv-01401
12	In Re:	Fuel injection Systems	2:12-cv-02201
	In Re:	Power Window Motors	2:12-cv-02301
13	In Re:	Air Conditioning Systems	2:12-cv-02701
	In Re:	Windshield Washer Systems	2:12-cv-02801
14	In Re:	Spark Plugs	2:12-cv-03001
	In Re:	Oxygen Sensors	2:12-cv-03101

MOTION HEARINGS

BEFORE SPECIAL MASTER GENE ESSHAKI
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Friday, December 9, 2016

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1 Detroit, Michigan

2 Friday, December 9, 2016

3 at about 9:16 a.m.

4 - - -

5 (Special Master and Counsel present.)

6 SPECIAL MASTER ESSHAKI: Good morning everybody.

7 The first matter on the docket this morning is the
8 plaintiffs' motions to compel -- strike that. This is In
9 Re: Automotive Parts Antitrust Litigation, Master File
10 No. 12-md-02311. The first matter on the docket this morning
11 is plaintiffs' motion to compel, item number 1187 and 1188,
12 entitled the parties' renewed motion to compel discovery from
13 certain non-original equipment manufacturers, and this
14 concerns what I like to refer to as the request 31. This is
15 a motion by the plaintiffs to ask the original equipment
16 manufacturers to disclose to them certain information sought
17 under request 31.

18 I indicated to a lot of the people that I met with
19 yesterday that I have had an opportunity to review at length
20 the motion, the response, the reply and, in fact, even
21 reviewed the case law with respect to this motion, so I do
22 not see a need for oral argument.

23 Does anyone out there feel a burning desire to
24 present something, oral argument on this case, or can we
25 simply -- can I proceed with my ruling?

1 || (No response.)

2 SPECIAL MASTER ESSHAKI: All right. Seeing no
3 indication I'm going to proceed with my ruling. Let me just
4 start out discussing the plaintiffs' motion. On January 19th
5 of this year, in addition to the joint motion to compel filed
6 against the OEMs, plaintiffs filed an additional motion to
7 compel. That motion sought production of documents subject
8 to request 31 in the serving party's subpoena, which
9 requested communications between the OEMs and the vehicle
10 parts suppliers, including defendants, regarding the
11 conspiracy and documents provided to the OEMs by vehicle
12 parts suppliers, including defendants, concerning the
13 conspiracy.

On March 24th, 2016 the motion was presented to me and I held it in abeyance preferring instead to address the OEMs' original -- a motion to compel from the OEMs. The defendants objected to this motion to produce documents claiming that subject to settlement privilege, and they cited the case of Goodyear Tire and Rubber vs. Child's Power Supply, decision of 6th Circuit, our own Judge Suhrheinrich, establishing a privilege that protects all communications made in furtherance of settlement regardless of whether the communications are informal or done under the auspices of the Court.

25 Plaintiffs make the argument that in that case the

1 parties had not yet sued, and therefore -- there was a case
2 pending but in this case there was no case pending and
3 therefore the settlement privilege should not apply.

4 They also argue that defendants cannot assert a
5 settlement privilege over the communications between --
6 because the OEMs never filed a case. Defendants come back
7 and assert that there is no need for a case to be pending for
8 the privilege to apply. There are some additional cases that
9 have developed after Goodyear.

10 It was surprising to me that in the case law that
11 has been cited, some as close as the Western District of
12 Michigan, which is our sister district in this state, that
13 many district courts are failing to follow the dictates of
14 Goodyear Tire, are finding ways to distinguish the case from
15 their particular case, and other district courts are simply
16 ignoring it and calling it bad law. I have not seen so many
17 cases challenging the rulings of an appellate court.

18 But some of the issues that I think all the parties
19 can agree upon are -- not issues but the rulings, evidentiary
20 privileges have to be narrowly construed. Privileges are
21 exceptions to demand -- for everyman's evidence and are not
22 likely created nor expansively construed for they are in
23 derogation for the search of truth; United States vs. Nixon.

24 Even under Goodyear Tire a settlement agreement is
25 not subject to exclusion based upon privilege. That's a

1 Western District case, Connan vs. Lake Superior and Ishpeming
2 Railroad Company. Settlement privilege extends only to
3 underlying discussions made during settlement negotiations
4 and not to the occurrence of settlement talks, the terms of
5 any settlement, or the settlement agreement itself; Ohio
6 Consumer Council vs. Puco.

7 Settlement privileges protect settlement
8 negotiations from discovery but does not extend beyond actual
9 negotiations to the terms of the final settlement agreement.

10 I am not going to go through the facts of Goodyear,
11 everyone knows the facts. I am -- I am in a bit of a
12 quandary because Rule 48, which the privilege is based upon,
13 indicates that settlement negotiations -- evidence of
14 settlement negotiations are not admissible. However, in the
15 discovery rule we know clearly that admissibility is not a
16 precondition to discovery, relevance is all that is
17 necessary.

18 In Goodyear, however, the Court indicated that
19 despite the clear language of Rule 408 that settlement
20 discussions are not admissible, the Court did, in fact,
21 create a new settlement privilege, and this Court, being
22 United States District Court for the Eastern District of
23 Michigan, and myself being the Master of Judge Battani --
24 strike that -- being Judge Battani's -- being the -- being a
25 master appointed by Judge Battani to address this case is

1 compelled to follow Goodyear.

2 As a consequence, I must hold that request
3 number 31 to the extent that it requests evidence of
4 settlement negotiations between the defendants and the
5 original equipment manufacturers will not be enforced, those
6 discussions and the evidence concerning those discussions are
7 barred. However, in my view the discussions that occurred at
8 the initial meetings where the defendants disclosed to the
9 original equipment manufacturers the existence of a
10 conspiracy, the nature, the scope and the duration of this
11 conspiracy, the parts that may have been involved in the
12 conspiracy are not settlement negotiations, they are a
13 prelude to settlement negotiations, they are disclosing the
14 wrongful acts, and settlement negotiations occurred after
15 that disclosure.

16 So to the extent that request 31 seeks information
17 concerning the initial meetings where the disclosures of the
18 conspiracy, the scope, the nature, the extent and the
19 duration and the number of parts were involved or discussed
20 they are not privileged. Additionally, I think even under
21 Goodyear the final settlement agreements that may have been
22 reached between the parties are not subject to settlement
23 privilege, so to that extent I am denying in part and
24 granting in part the plaintiffs' request to enforce rule
25 number 31.

1 The next matter on our agenda today is the -- I'm
2 sorry.

3 MS. ROMANENKO: Just a quick point.

4 SPECIAL MASTER ESSHAKI: Please identify yourself.

5 MS. ROMANENKO: Victoria Romanenko for dealership
6 plaintiffs.

7 Your Honor, I wanted to clarify, the request also
8 sought documents exchanged between the OEMs and suppliers,
9 suppliers in general, not just defendants, concerning the
10 conspiracy as well as internal discussions and discussions
11 with non-defendant suppliers regarding the conspiracy. It is
12 our understanding that these were not settlement discussions.

13 SPECIAL MASTER ESSHAKI: I'm afraid I can't make
14 that conclusion. Documents that were exchanged between the
15 parties -- once -- once the conspiracy has been identified,
16 once the wrong has been described, anything after that is
17 settlement negotiations. So that if the defendants were to
18 come back and say here is a spreadsheet describing all of the
19 parts involved, describing the markups that we imposed, how
20 long they went, where the parts were sold, what vehicles they
21 went into, are, in fact, settlement negotiations.

22 Similarly, if the OEMs are responding with their
23 own analyses of the damages that they calculate based upon
24 the information that was conveyed to them, again, those are
25 settlement negotiations and/or work products that are not

1 going to be subject to disclosures.

2 Your second point was?

3 MS. ROMANENKO: So my second point was internal
4 discussions within the OEM as well as discussions between
5 OEMs and non-defendant suppliers, ones that didn't
6 participate in the conspiracy.

7 SPECIAL MASTER ESSAKI: Between defendants and
8 non-OEM suppliers?

9 MS. ROMANENKO: Between OEMs and non-defendant
10 suppliers.

11 SPECIAL MASTER ESSAKI: Again, I'm going to fall
12 back on my ruling without knowing what this type of
13 information is. If it is disclosing the wrongful conduct,
14 the scope, the duration, the extent, those are not
15 privileged. If there are discussions that occurred regarding
16 here is a spreadsheet that shows what we think the damages
17 are and discussions occur internally at the OEMs saying this
18 is our analysis and this is how we should respond, I believe
19 those would be settlement negotiations, privileged and/or
20 work-product privilege, so once the dispute has been
21 identified the privilege in my mind attaches.

22 With respect to non-parties, I think the same thing
23 occurs, if a non-party -- a non-defendant comes in and says
24 to General Motors we have learned that this conspiracy
25 developed within our organization or we participated within

1 this conspiracy, describes it to General Motors, how long it
2 went, what parts were involved, so on and so forth, not
3 privilege. A settlement document with that non-party and
4 General Motors, not privilege. Anything between those two,
5 privileged.

6 MS. ROMANENKO: Okay. Understood. I understand
7 Snap-on states that a discussion about the ongoing business
8 relationship --

9 SPECIAL MASTER ESSHAKI: Yes, I know, and while I
10 find Snap-on to be very attractive and to be an exceptional
11 decision that is issued by a special master, somebody of that
12 low character in the judicial system, it is not controlling,
13 we are required to follow Goodyear.

14 MS. ROMANENKO: Okay. Understood. Thank you.

15 SPECIAL MASTER ESSHAKI: Would you please prepare
16 an order and would you share it with defendants, and once it
17 is approved send it back to me for entry and be sure to
18 include magic language about the appeal rights?

19 MS. ROMANENKO: As soon as we've got the transcript
20 available we will prepare an order and circulate it.

21 SPECIAL MASTER ESSHAKI: All right. Thank you.

22 MS. ROMANENKO: Thank you.

23 MR. FENSKE: Master, may I be heard?

24 SPECIAL MASTER ESSHAKI: Please, identify yourself
25 counsel.

1 MR. FENSKE: Dan Fenske for Mitsubishi Electric for
2 the defendants.

3 I just wanted to clarify one aspect of your ruling,
4 particularly on the settlement agreement point. Is Your
5 Honor ruling simply that the settlement agreements are not
6 privileged or are you actually compelling production?

7 SPECIAL MASTER ESSAKI: I'm compelling production.

8 MR. FENSKE: Your Honor, as to that point our
9 position is if you read the plaintiffs' motion, in the motion
10 they don't ask for settlement agreements anywhere in the
11 initial motion, so our position -- we didn't address it in
12 our response brief because we didn't believe that's what they
13 were seeking, so our position is respectively that they
14 waived their motion only as to settlement agreements.

15 SPECIAL MASTER ESSAKI: Ms. Romanenko?

16 MS. ROMANENKO: Your Honor, we disagree. We
17 requested all communications and negotiations between the
18 OEMs and suppliers concerning the conspiracy. A settlement
19 agreement is very clearly a communication between OEMs and
20 suppliers concerning the conspiracy. Defendants very clearly
21 knew that settlement agreements were at issue because in
22 their own cases that they cited, including Conlin, including
23 Snap-on, the Court decided -- or the Master decided that
24 settlement agreements were producable. These were clearly
25 at issue, they clearly knew that this was going on, and if

1 they had anything further to say about it they would have
2 said it.

3 And I also will note that I think Your Honor even
4 mentioned that at the mediation, so if they had any further
5 points to make they could have made them in this follow-up
6 briefing that just occurred.

7 SPECIAL MASTER ESSHAKI: Give me a moment, please,
8 Counsel.

9 MR. FENSKE: Of course.

10 SPECIAL MASTER ESSHAKI: Okay. I can see how you
11 can take the position that the request 31 was limited to
12 communications between the OEMs and any defendants or other
13 part suppliers in connection with the facts described in
14 plaintiffs' complaint. In the interest of saving time, I'm
15 going to order that the settlement agreements be produced.
16 You can appeal that to Judge Battani.

17 MR. FENSKE: Okay. Your Honor, just before we move
18 on, we didn't brief this because it wasn't brought up in the
19 opening brief. However, we have basic relevance objections
20 to the production of settlement agreements at least as to the
21 moving plaintiffs' cases. The -- there are some case law
22 that says that settlement agreements are sometimes at some
23 point in the case relevant when the settlement agreement is
24 with an absent class member, for example. That would only be
25 relevant to the DPP cases, Your Honor. The DPPs have not

1 moved to compel production of these settlement agreements, so
2 we have a basic just relevance objection to their production.
3 I don't believe I have heard any discussion as to why the
4 settlement agreement itself would even be relevant to the
5 moving plaintiffs' cases.

6 In addition, I just want to note that the
7 production of these settlement agreements would potentially
8 chill future settlements between OEMs and the defendants. As
9 Goodyear notes, confidentiality is a critical component to
10 achieving a settlement. And the plaintiffs noted in their
11 briefing that no OEMs have filed the case but they never
12 asked themselves why, and the likely reason why, of course,
13 is the OEMs and the defendants are resolving their cases.
14 They have been relying on Goodyear and they have been relying
15 on the general respect that courts have for the
16 confidentiality of settlement agreements that they only be
17 produced, the actual settlement agreement, at the point which
18 they are necessary in a case and not until then.

19 So I would ask Your Honor to be mindful of that and
20 respectfully ask Your Honor not to compel production of the
21 settlement agreements, instead let the defendants and the
22 plaintiffs discuss their potential relevance because we don't
23 know what the relevance of the actual agreement might be as
24 opposed to the briefing focused on which were the
25 communications, and then we can bring it before Your Honor if

1 there is a further dispute.

2 SPECIAL MASTER ESSHAKI: Again, my response would
3 be that in the interest of time, because time is of the
4 essence today in this case, I am going to order that the
5 settlement documents be produced. There are two options; one
6 is you can engage in negotiations with the plaintiffs to see
7 if they are willing to negotiate something less than full
8 production of the settlement agreements or all of the
9 settlement agreements between now and the time that the
10 matter is presented before Judge Battani, or you can take the
11 entire matter before Judge Battani on the relevancy of the
12 settlement production and my order that they be produced.

13 MR. FENSKE: All right. Just so the record is
14 clear, our position would be because they didn't open it
15 in -- or address settlement agreements in their opening brief
16 that they waived their right to seek those, so the record is
17 clear on that. Thank you, Your Honor.

18 SPECIAL MASTER ESSHAKI: I don't see that would
19 prevent them from serving a subpoena tomorrow asking for
20 them, that's why I am saying it is in the interest of saving
21 time.

22 MR. FENSKE: Thank you.

23 SPECIAL MASTER ESSHAKI: Thank you. Okay. The
24 next issue that we have on our agenda today is Denso's motion
25 regarding discovery with respect to the original equipment

1 manufacturers.

2 And, Mr. Cherry, would you simply come up and state
3 the nature of this motion and the relief requested.

4 MR. CHERRY: Yes, Your Honor. So our position is
5 sort of twofold. One is for the wire harness's case, at this
6 point we have settled with the indirect purchasers so we have
7 no need for downstream discovery and we've made that clear,
8 and for upstream part-specific discovery in wire harnesses we
9 have a summary judgment motion pending and if that motion is
10 granted, and we are hopeful it will be, then we have no need
11 for upstream discovery. So we believe it is in everybody's
12 interest to hold upstream part-specific discovery for wire
13 harness products in abeyance until the Court rules on that
14 summary judgment motion. Hopefully we will never need it and
15 no one will have been put to an unnecessary burden.

16 For subsequent cases, and the next case for us
17 would be the instrument panel cluster case and we have some
18 after that, those -- a couple of those are just starting
19 discovery, others haven't yet, and so it is unclear what we
20 will need. We may find ourselves in the same situation that
21 we are in for wire harness products. So our position is for
22 subsequent cases that upstream part-specific discovery in
23 those cases should be staged -- staggered so that it is
24 addressed when the particular case is starting to move
25 forward and people have a better idea of specifically what's

1 needed for those cases.

2 Now, that also has the added benefit of freeing
3 everyone to focus on the lead two cases, getting those
4 productions done as quickly as possible. They -- those have
5 class certification schedules that keep getting delayed, and
6 hopefully by focusing on those two products the next
7 scheduling, if they are extended, could stick and those can
8 move forward.

9 I believe our -- well, what we refer to as
10 staggered discovery in these other cases will be well
11 informed by the discovery in those lead two cases and that
12 may form sort of a template for what's produced, but we also
13 ask for the ability, first of all, to be informed by their
14 experience, maybe we will find that we can do with less given
15 what happens in those cases hopefully, but we may also find
16 that there is some additional targeted discovery about a
17 particular RFQ, something of that nature, that's needed for
18 our direct purchaser case in a particular product that we
19 would want the ability to ask for, not be foreclosed from
20 doing that.

21 That's the relief that we seek, Your Honor.

22 SPECIAL MASTER ESSHAKI: So basically what you are
23 asking is for a standstill in part -- Denso's requesting a
24 standstill on upstream discovery from the OEMs because they
25 have -- first, they have resolved the downstreams and,

1 secondly, because as to the direct purchaser plaintiffs where
2 there may be some additional upstream discovery that is
3 necessary you have filed motions for summary judgments that
4 are currently pending and if they rule in your favor -- the
5 judge rules in your favor the discovery won't be necessary at
6 all.

7 MR. CHERRY: That's exactly right for wire harness.

8 SPECIAL MASTER ESSHAKI: But you also want to
9 reserve your right that if the judge rules against you, you
10 are not foreclosed to go back and get that information nor to
11 seek that information if you find it necessary with respect
12 to other cases?

13 MR. CHERRY: Exactly, Your Honor.

14 SPECIAL MASTER ESSHAKI: All right. Do I have any
15 objection? Mr. Williams?

16 MR. WILLIAMS: Good morning, Your Honor.

17 Steve Williams for indirect purchasers.

18 I don't know if it is an objection so much, but we
19 find ourselves in a different position from Denso because
20 Denso having resolved the indirect purchaser cases has no
21 need for this discovery whatsoever. We in our motion, as the
22 Court is aware, have agreed to focus on the first two cases
23 that have the initial class certification schedules, but I
24 think the difference is, as I hear Mr. Cherry's argument, it
25 is a deferral to put everything on hold, and I think for

1 us --

2 SPECIAL MASTER ESSHAKI: As to Denso only.

3 MR. WILLIAMS: As to Denso only, and if that's so
4 that's fine, we simply don't want the resolution of Denso's
5 motion to have the effect of then saying as to the indirect
6 purchasers, who do have schedules and do have cases ongoing
7 and do have needs for discovery, that we should be limited
8 after the productions in the first two cases from then in a
9 timely manner being able to receive the productions in the
10 later cases, so it is just a nuance.

13 MR. WILLIAMS: Thank you.

14 MR. CHERRY: May I say something?

15 SPECIAL MASTER ESSHAKI: Sure.

16 MR. CHERRY: I think this addresses Mr. Williams'
17 concern, maybe this is where you are headed, is at your
18 request, you know, and when we filed a motion we initially
19 proposed an order which would hold discovery in these
20 subsequent cases in abeyance and stagger it as a matter of
21 formality.

22 I think the last time we were before you you asked
23 for a proposed order that was more along the line of a
24 compromise, which we submitted I think on November 30th, and
25 I think that addresses Mr. Williams' concern.

1 SPECIAL MASTER ESSHAKI: Just one minute. Does
2 that, Mr. Williams, have you seen that order and does it
3 address your concerns?

4 MR. WILLIAMS: I have, and I think it does. I
5 would like if I could have an opportunity to confirm that
6 after we finish all the proceedings today, and if I do have
7 an objection or a concern I will address the Court and the
8 OEMs.

9 SPECIAL MASTER ESSHAKI: I would like it to be
10 clear that with respect to the order it only concerns Denso,
11 it has no impact whatsoever on any of the other -- of the
12 plaintiffs in this matter, nor will it impair any of their
13 discovery from the OEMs.

14 MR. WILLIAMS: Thank you, Your Honor.

15 SPECIAL MASTER ESSHAKI: So let's take another
16 close look at the draft order, but I have to hear from
17 Mr. Kass, who is waiting anxiously in the corner. You are
18 not done, sir. Mr. Kass.

19 MR. KASS: Thank you, Your Honor. For the record,
20 it is Colin Kass for FCA.

21 I just -- I don't have a problem with Denso not
22 wanting to share in the costs if they are not going to
23 receive the discovery, and that's fine. The one thing I want
24 to make clear, at least from our perspective, is the concept
25 of phase discovery generally raises some issues. It may, in

1 fact, just split up the burden over time, but when the Court
2 is considering the burden of the subpoena that's being asked
3 it has to consider all of the parts that are being requested
4 under the entire subpoena, and it can't just say for, you
5 know, because the burden today is only limited to one part
6 the subpoena is reasonable without considering the fact that
7 tomorrow they might ask for another part and another part and
8 another part.

9 So Denso's reservation of rights to come back later
10 in time doesn't obviate the overall burden with the subpoena,
11 and I just want to make it clear that we would continue to
12 object to the entire subpoena at this point based on the full
13 scope of what they are asking for and that it would be the
14 continuing objection when and if Denso ever comes back later
15 in time to seek additional documents from us, particularly if
16 by waiting Denso has increased the burden. If their timing
17 is somewhat different than any other party it could have the
18 potential of increasing the burden which would provide an
19 additional basis for objection. So the pure reservation of
20 rights that Denso's seeking and a standstill agreement that
21 if they were to get that could, in fact, end up prejudicing
22 at least FCA so we would be concerned about that.

23 SPECIAL MASTER ESSHAKI: Mr. Kass, by the same
24 token, as I see this, Denso is taking a risk that by
25 deferring now they may require information within a much

1 shorter time frame and producing that information in that
2 much shorter time frame may be more costly, so they are
3 bearing that risk.

4 MR. KASS: As long as it is clear that they are
5 bearing the risk and they can't rely on an order for
6 standstill that they are put back into the position of today
7 in the future when circumstances may change and the burdens
8 may change in the future.

9 SPECIAL MASTER ESSHAKI: On the other hand, if
10 circumstances haven't changed and the burden hasn't changed
11 then there is no prejudice to putting them back in the
12 position, you will have to prove that.

13 MR. KASS: If there is no prejudice there is no
14 prejudice.

15 SPECIAL MASTER ESSHAKI: Thank you, Mr. Kass.

16 Acceptable, Mr. Cherry?

17 MR. CHERRY: Yes, Your Honor. In fact, our
18 proposed compromise order that you requested has a specific
19 provision that this is not -- this doesn't prejudice either
20 our ability to ask for some additional targeted discovery,
21 their ability to oppose that discovery and, of course, you
22 know, this issue I think that Mr. Kass raises is really only
23 for -- would only come up for additional discovery, otherwise
24 I would think, particularly if Mr. Williams has gone forward
25 with his discovery, it would simply be a matter of us asking

1 to receive some of that and paying for it at that point.

2 SPECIAL MASTER ESSHAKI: And does your -- Furukawa
3 has joined in this motion. Are they seeking the same relief?

4 MR. CHERRY: They are.

5 SPECIAL MASTER ESSHAKI: They want the same
6 standstill order?

7 MR. CHERRY: Yes.

8 SPECIAL MASTER ESSHAKI: And the order does extend
9 to them?

10 MR. CHERRY: Yes.

11 SPECIAL MASTER ESSHAKI: I didn't bring it, I
12 apologize.

13 MR. CHERRY: It does, and they are only in the wire
14 harness case.

15 SPECIAL MASTER ESSHAKI: Excellent. That would be
16 fine, sir. Send the order back to Mr. Williams, let him have
17 an opportunity to take a look at it, include the magic
18 language about appeals, and I will have it signed and
19 entered.

20 MR. CHERRY: Thank you, Your Honor.

21 SPECIAL MASTER ESSHAKI: Okay. I have to find my
22 next outline please. All right.

23 The next matter on our agenda is the motion to
24 compel enforcement of the subpoena filed by the parties
25 against the original equipment manufacturers, and the history

1 of this motion is that it was originally brought to me in
2 approximately March of this year. At that time I attempted
3 to conduct some mediations and negotiations between the
4 parties and the original equipment manufacturers, and simply
5 fell short. I fell short because the issues were so large,
6 the subpoena was so large, the number of parties were so
7 numerous, that I could not make progress towards a settled or
8 mediated solution.

9 But during the course of my discussions it became
10 very clear to me that the parties and I believe many of the
11 counsel that were representing the original equipment
12 manufacturers were uneducated as to the data retention
13 systems that were being employed at each of the original
14 equipment manufacturers, and every time a question was asked
15 of a -- one of the parties to OEMs, do you maintain this, the
16 response was I don't know, is this readily accessible, and
17 the response was I don't know.

18 So as a consequence I determined in March that it
19 was best if the parties were given an opportunity to conduct
20 30(b) (6) depositions of the OEM systems employees, the
21 employees of the OEMS that had the greatest knowledge of the
22 systems that were in place and the systems that are now
23 off-line or in storage, in order to get a better
24 understanding of what was -- what data was being maintained
25 by the OEMs, how readily and reasonably accessible the data

1 was, and whether that data could be produced at a reasonable
2 price.

3 The subpoena at that time, I was informed, involved
4 approximately 1.5 billion documents, and I indicated I was
5 not going to enforce a subpoena for 1.5 billion documents and
6 go down in history as the person who enforced the largest
7 subpoena in the country.

8 The parties, in my estimation, have worked
9 diligently. I'm absolutely impressed with how the parties
10 have met and conferred over and over again in the interest of
11 reducing the scope of the subpoena, relieving the burden it
12 places upon the OEMs and yet obtaining what is essentially
13 critical information, the lifeblood -- that is the lifeblood
14 of this case.

15 In November I convened a second mediation after the
16 30(b) (6) depositions were concluded, and at that time it was
17 clear to me that counsel for the parties had a very good
18 grasp on the individual document retention systems that were
19 employed at each of the OEMs, and that counsel for the OEMs
20 had a much more improved understanding with respect to their
21 respective clients' document retention systems so that an
22 educated discussion about what documents are available, how
23 readily accessible are they, how far back do they go, was in
24 my mind quite fruitful.

25 So we conducted approximately nine hours of

1 mediation during a session in November and, again, I overshot
2 my target because there were still so much -- still so many
3 issues to address that while I had scheduled each OEM for a
4 session regrettably I could only get to three or four of them
5 and I had to turn some away.

6 So yesterday we conducted another approximately
7 nine hours of mediation, and I started with the OEMs that I
8 was forced to turn away in November because of a lack of
9 time, and we had some fruitful negotiations yesterday. It is
10 my intention today to provide everybody with a preliminary
11 ruling and to then separate the OEMs and address them one by
12 one outside of the other OEMs with representatives of the
13 moving parties.

14 So that being the case I want you to understand the
15 following: Approximately 18 months ago the parties,
16 consisting of defendant end payor plaintiffs, truck and
17 equipment dealer plaintiffs and the States of Florida and
18 Indiana, filed their request for a subpoena against a number
19 of original equipment manufacturers. These OEMs allegedly
20 purchased parts for use in their automobile manufacturing
21 processing that were allegedly subject to a conspiracy to
22 inflate, fix and sustain over time inappropriate and unlawful
23 pricing for their parts.

24 The original subpoena directed to the OEMs was all
25 encompassing and breathtaking in the scope. For 18 months

1 the OEMs have engaged -- OEMs and the parties have engaged in
2 numerous meet and confer sessions to narrow the scope of the
3 subpoena. This matter was brought before me to enforce the
4 subpoena in approximately March of this year. During the
5 March mediation session and hearing I determined that there
6 was insufficient information available as to the type of data
7 that was maintained by the OEMs, whether it was readily and
8 reasonably accessible and how and where the data was
9 maintained.

10 As a consequence I ordered that the OEMs produce
11 30(b) (6) witnesses to testify as to their respective data
12 storage processes, the location of the data, the systems upon
13 which the data was stored, and how easily could they access
14 and produce pursuant to the subpoena. My order was appealed
15 and properly altered by Judge Battani but the 30(b) (6)
16 depositions were, in fact, in the end ordered in the
17 appropriate manner.

18 The 30(b) (6) depositions have now been completed
19 and from the filings in this case it is clear that the
20 parties and counsel for the OEMs have a much clearer
21 understanding of the data maintenance and storage processes
22 at each of the OEMs. The parties assert that they have
23 significantly narrowed the data being requested from the OEMs
24 while the OEMs argue that the subpoena is still crushingly
25 overly burdensome to them. The parties no longer seek

1 upstream discovery as to wire harness cases at this time
2 because of the resolution of the cases between the indirect
3 purchase plaintiffs and defendants. Additional upstream
4 discovery may be required in an event that Denso's motion for
5 summary disposition is ultimately denied by the Court as I
6 have just ruled.

7 The parties have also suggested staggering upstream
8 data production and beginning with two lead cases, bearings
9 and anti-vibrational rubber parts. The parties have also
10 narrowed the subpoena by limiting the documents requested
11 from non-defendant suppliers to a limited list of three to
12 perhaps five non-defendant suppliers per part cases, and from
13 my discussions yesterday I think that number is even lower.

14 Additionally, because of the assertions by the OEMs
15 of the unique and individualized burdens associated with
16 collecting and producing vehicle costs and pricing data
17 involving a large number of vehicle models, the parties have
18 agreed with certain OEMs to limit their request for this type
19 of information to a limited number of vehicle models and
20 model years, and this is being done by an OEM by OEM basis
21 which I will address when I address each OEM. The parties
22 have reached individual concessions with many of the OEMs to
23 lighten the burden of the subpoena.

24 Recently the parties have offered to pay one half
25 of each OEM's cost of collection and production of data and

1 documents that are not readily accessible and where the OEMs
2 have articulated a clear burden. The offer does not include
3 reimbursement for any attorney fees.

4 Courts have been instructed to avoid the imposition
5 of substantial burdens to a non-party subject to a discovery
6 subpoena, and must determine that the data requested is
7 proportionate to the needs of the case at hand. This is
8 coming directly from the parties' brief. For more than two
9 years in this case more than 100 law firms have made an
10 unprecedented collaborative effort to pursue discovery in a
11 way that would satisfy the varying needs of multiple groups
12 of plaintiffs and more than 100 defendants across dozens of
13 complex antitrust actions involving 40 different parts while
14 attempting to minimize the burden on the entities served.

15 This case is unprecedented in scope, and as a
16 consequence even the revised and reduced-down subpoena as
17 further reduced by our discussions of yesterday is still
18 unprecedented in scope.

19 In weighing all of the factors that the courts are
20 instructed to look at in determining whether a subpoena is
21 reasonable, proportionate, and does not impose an undue
22 burden upon a third party, in this case the one factor that
23 outweighs all others is the size of the case, the public
24 interest at stake, and the necessity to attempt to right a
25 significant economic wrong.

1 It is alleged that millions of residents of the
2 United States over a 20-plus-year period purchased
3 automobiles containing parts manufactured by defendants that
4 were price fixed and consequently paid more for their
5 automobiles than they should have paid had the price not been
6 fixed.

7 It is estimated that approximately 75 million
8 vehicles and accordingly 75 million individual purchasers
9 have been damaged by this alleged conspiracy, and the remedy
10 for that damage has to be paramount in determining
11 proportionality, burden and cost shifting.

12 From the presentations of the parties and the OEMs,
13 it is clear that no two OEMs maintain their upstream or
14 downstream data in an identical or even a similar manner. By
15 way of example, some OEMs destroy all RFQs after a bid has
16 been received, others maintain their RFQs. Some OEMs
17 maintain live data going back a limited number of years and
18 store accessible data for a limited number of more years and
19 have unaccessible data going back even more years.

20 Any order compelling production will have to be
21 tailored by the parties and the OEMs to reflect the reality
22 of the data-storage systems maintained by a particular OEM.
23 That was the purpose of our last two mediation sessions, and
24 that is what's going to occur at the conclusion of my
25 discussion this morning.

1 Based upon the foregoing, I am going to grant the
2 parties' motion to compel discovery from the original
3 equipment manufacturers pursuant to the previously served
4 subpoena subject to the following: The subpoena will not
5 extend to documents in the possession of wholesale individual
6 custodians. The parties are free to negotiate custodial
7 searches at a level one or two or a small handful but to say
8 that we want the custodians of all documents that are the
9 employees of General Motors to search their files will not be
10 ordered.

11 Next, the subpoena will only extend to documents
12 and data on currently live data stored systems and any
13 predecessor system that are easily accessible and reasonably
14 available for the production of data by the OEMs.

15 Additionally, the OEMs will not be required to produce any
16 data that does not exist in category number two above, that
17 is, existing live systems or readily accessible predecessor
18 systems such as information not readily accessible and data
19 that cannot be produced in a reportable form because the
20 system upon which it is stored cannot create reports.

21 The OEMs do not have to rewrite code, create new
22 systems to transfer their stored data in order to put it into
23 a reportable format.

24 I'm going to skip the next point because it deals
25 with staggering, and I think we have had -- we have reached

1 an agreement on staggering in the last couple days. With
2 respect to downstream information, it is not a staggering
3 issue, staggering is upstream only, it is dealing with ball
4 bearings and anti-vibration rubber parts. There is no way
5 to downstream -- to stagger downstream, downstream data, as
6 ultimately agreed upon, is going to have to be produced
7 across all parts at one time.

8 The information from the OEMs regarding incentives
9 and rebates shall only be produced after a ruling of -- by
10 Judge Battani on the appeal of the undersigned order denying
11 such information on the grounds of relevancy. That order is
12 currently pending. If the Judge indicates that my ruling was
13 incorrect, that information falls within the confines of the
14 subpoena, and it should be produced -- will be produced.

15 I find the wholesale suggestions by Nissan and I
16 think General Motors of phase discovery involving production
17 of exemplars of potential documents, inquisition by the
18 parties as to the exemplars themselves, filling in one or two
19 exemplars, and permitting the parties to see what they look
20 like and then going forward with additional document
21 production, while it may be a logical and intelligent way to
22 generate the data being requested, we simply don't have the
23 time left to engage in that type of process. It will be --
24 it will double or triple the time necessary to complete this
25 process, and accordingly that suggestion is rejected.

1 We have also had extensive discussions on what has
2 been determined or called the crown jewel information. The
3 crown jewel information has been described to me as the
4 pricing information, data processes employed by the original
5 equipment manufacturers to establish their vehicle prices.
6 The original equipment manufacturers have indicated these are
7 the crown jewels, only a handful of people in the entire
8 world know about this information, know how prices are
9 established, and it would be extremely damaging to the
10 original equipment manufacturers if their pricing information
11 should get into the hands of a competitor or become part of
12 the realm of public knowledge.

13 I understand how critical this information is and
14 at the same time I understand how important it is to the --
15 at least to the plaintiffs' part of the parties moving to
16 have this information in order to establish their passthrough
17 analysis. I am going to accept the plaintiffs' suggested
18 additional confidential and security provisions. There is a
19 confidentiality agreement order in place in this case that
20 will remain in place, but in addition as to this confidential
21 information that information will be loaded down by the OEMs
22 to a thumb drive, to a disk or to some other data storage
23 instrument and it will be designated expert eyes only. All
24 such information may only be viewed by the parties' experts
25 in a freestanding computer, one that is not connected to the

1 Internet or otherwise accessible by any source outside of the
2 expert's own office. I envision that the experts -- the
3 parties will prepare a specific additional confidentiality
4 order governing this type of data that will be signed by
5 every expert that receives the data.

6 If the experts are required to make a copy of the
7 data in order to manipulate it, all such copies shall be
8 simultaneously recorded under a sworn log which will record
9 the name of the person making the copy, the time and date the
10 copy was made, whether this is copy number one, two, three,
11 and how the copy was maintained; was it maintained on an
12 additional freestanding computer, was it knocked off to
13 another disk, was it put onto another thumb drive.

14 When this case concludes, the original disks and
15 thumb drives or any other data holding system, as well as
16 each and every copy that was made by each and every expert,
17 will be returned to the original equipment manufacturers with
18 an affidavit indicating that all copies have been returned,
19 the additional security order has been fully maintained by
20 the experts, and no person outside of the expert's office has
21 had access to any of the data.

22 As to the attorneys for the parties, they are
23 prohibited from reviewing the data on the thumb drives or the
24 disks or the copies of the thumb drives or the disks that are
25 made by their experts. They may only review and discuss the

1 output of the expert's inspection. They can query the
2 expert's reports, they can query the expert's results, but
3 they cannot query any of the substantive data that the
4 experts have received concerning these crown jewel -- this
5 crown jewel information.

6 There has been a significant argument posed by the
7 original equipment manufacturers as to cost sharing. This
8 argument has already been -- has bubbled up to the top in
9 front of Judge Battani, and she has indicated on two
10 occasions I believe her views on this. The first indication
11 was that at a minimum, vis-á-vis the 30(b) (6) depositions,
12 the parties are going to bear at least half the cost of those
13 depositions. She has also stated, and she may have stated
14 this first, that the parties requesting the data are the
15 parties that have to pay for the data.

16 In taking those as my leads, I have determined as
17 follows: As to the 30(b) (6) depositions previously conducted
18 by the parties, the cost of such depositions, including
19 outside legal fees incurred in preparing witnesses to
20 testify, shall be borne 60 percent by the parties. As to
21 document production costs in connection with compliance with
22 the subpoena, the parties shall bear 70 percent of all
23 production costs incurred by the employees -- excuse me,
24 incurred by the employees of the OEMs, this will include
25 employee time, outside services, and reproduction costs.

1 Excluded from this latter cost sharing is the payment of any
2 legal fees incurred by the OEMs for either in-house or
3 outside counsel in connection with the production of
4 documents ordered under the subpoena.

5 That is the conclusion of my general ruling, and
6 what I would like to do is take a ten-minute break, and then
7 we staggered yesterday which of the OEMs were going -- I
8 think Nissan was going to come last but I don't remember. We
9 also had -- I believe Hyundai was going to be second to the
10 last. I don't remember who the first, second, third -- do we
11 have any order that we have agreed upon or that would be
12 logical, please?

13 Identify yourself, sir.

14 MR. HEMLOCK: Adam Hemlock, Weil, Gotshal & Manges,
15 on behalf of Bridgestone and Calsonic defendants.

16 May I ask for one point of clarification in your
17 order?

18 SPECIAL MASTER ESSHAKI: Yes.

19 MR. HEMLOCK: With regard to the pricing documents,
20 the documents and data that the OEMs hold relating to the
21 pricing of vehicles, in my mind, Your Honor, there are really
22 two categories there, one are what I think of as more
23 documents, for example, memos, PowerPoints, documents with
24 words. We understand that the OEMs are in possession of
25 documents where they describe how they set the prices, what

1 factor are involved and so on. Separate and apart from that,
2 Your Honor, there is pricing data, in other words, numbers,
3 spreadsheets, databases of that nature. My understanding,
4 Your Honor, had been that the -- I believe the proposal from
5 the serving parties as to how to provide the data to the
6 experts and the economists for them to analyze, that was
7 limited to the data.

8 The documents regarding what I will call the
9 narrative documents, how they set prices, PowerPoints, memos,
10 those are documents that necessarily the lawyers need to have
11 because it relates to the legal issues in the case about how
12 they set prices and what the arguments are for and against
13 and so on. With respect to those, I would kindly ask that
14 Your Honor clarify that the outside lawyers, not in-house
15 lawyers and certainly not businesspeople, be permitted to
16 review those. They would not be -- they otherwise would not
17 be helpful to the serving parties at all.

18 SPECIAL MASTER ESSHAKI: My concern is the number
19 of outside attorneys representing the parties that would have
20 access to this information. If it is -- we are talking 100
21 lawyers I am not inclined to do that. I understand and
22 appreciate the sensitivity and highly, highly critical nature
23 of this data, so I need to have some sort of suggestion as to
24 a limitation on outside counsel carving out this portion, how
25 many outside counsel will have access to it.

1 MR. HEMLOCK: Sure.

2 SPECIAL MASTER ESSAKI: It may be that you can
3 designate a team.

4 MR. HEMLOCK: Sure. I have one idea just even to
5 start. As you know, we have 39 cases, 40 cases, we have all
6 lost track. There is no reason why the 40th case today needs
7 to see that information. Most of these cases are nowhere
8 close to being in discovery, many of them don't even have a
9 protective order or a discovery plan yet, so at a minimum, I
10 mean, if we look at -- in my mind you have the lead two
11 cases, this is only downstream, so wire harness lawyers don't
12 need to look at this, we've got bearings and anti-vibrational
13 parts, the lawyers there certainly need to look at it and we
14 could arrange perhaps for some limited number to see those
15 documents. Then we've got the tranche one cases, the cases
16 that are right behind, and I believe those are just starting
17 discovery. I think some of them have a plan, or if they
18 don't they are just about to have one entered and, again,
19 those lawyers would shortly have to look at those. But as to
20 the ones later on we could figure out some arrangement I
21 think.

22 SPECIAL MASTER ESSAKI: I think I need to hear --
23 Mr. Williams, do you have something to say?

24 MR. WILLIAMS: I do, Your Honor. Very briefly.
25 Thank you for giving us your ruling, and I want to

1 consider -- I understand the points counsel is making, and I
2 share some of those concerns but I want some time to think
3 how this would apply.

4 The point I wanted to make now is as to what we
5 call the crown jewel pricing documents. I believe this is
6 only General Motors' issue, the other OEMs have not asked for
7 that level of protection, so I would like to ask for a
8 clarification as to --

9 SPECIAL MASTER ESSHAKI: I think I heard quite
10 clearly yesterday Nissan asked for it, I may have been
11 mistaken but I thought Fiat Chrysler America asked for it.

12 MR. KASS: Your Honor --

13 SPECIAL MASTER ESSHAKI: Colin Kass, please.

14 MR. KASS: Colin Kass.

15 Just for the record, at least in the offers of
16 production and the discussions we have had, they have not
17 actually pursued that because it is custodian information
18 from Chrysler so it may not be an issue as to Chrysler. To
19 the extent that it could conceivably be ordered, even though
20 we believe it has not been waived, we certainly would need
21 substantial protection along the lines of what GM is asking
22 for.

23 SPECIAL MASTER ESSHAKI: Well, Mr. Kass, you raise
24 a fine point. I did not intend to mean that wholesale
25 custodian searches, which I have prohibited under my ruling,

1 would prevent the production of pricing information. I could
2 see how you could interpret it that way, but just because the
3 pricing information happens to be in the hands of a custodian
4 doesn't protect it from disclosure, I'm going to protect it
5 in another way.

6 MR. KASS: It wasn't part of your order that drove
7 this, it was part of the negotiations between the parties and
8 Chrysler, that category of documents with information had
9 dropped out a long time ago.

10 SPECIAL MASTER ESSHAKI: All right. I am more than
11 willing to deal with this on an OEM by OEM basis, but I want
12 to hear what an OEM has to say.

13 Counsel, please identify yourself for the record.

14 MR. WOLFSON: Adam Wolfson, Quinn Emanuel on behalf
15 of General Motors, Special Master.

16 The issue of confidentiality, I know we briefed
17 that and I understand the Special Master's order to the
18 extent that we can address it I think we need to with
19 Judge Battani but I understand that for now.

20 One point though that I would like to identify with
21 respect to the confidentiality procedures that you mentioned
22 is this idea of putting these materials onto a thumb drive
23 and then delivering it to the experts is that is the typical
24 nowadays. We have thumb drives that are encrypted, password
25 protected.

1 SPECIAL MASTER ESSAKI: You are absolutely right,
2 the thumb drive needs to be encrypted, it needs to be
3 password protected. I forgot to add that. Thank you,
4 Counsel.

5 MR. WOLFSON: But -- but my experience in other
6 cases where there is hypersensitive materials such as source
7 code for programs for companies where there may be -- well,
8 if that source code gets out it is a very critical breach for
9 that company. The way that these materials are handled for
10 these heightened protections is that they are kept onsite in
11 a location controlled by the party whose information it is.
12 So it would be on a computer, not connected to the Internet,
13 all of those protections, but at, for example, to use General
14 Motors, one of their outside counsel's office here in Detroit
15 and parties that want to come review the materials can --

16 SPECIAL MASTER ESSAKI: Experts that want to come.

17 MR. WOLFSON: Experts, exactly. They can come in,
18 they have to schedule their time, if they want to make copies
19 it is logged, and there is version control within that is
20 controlled by the party producing that so there is less
21 chance of proliferation. So I respect the order, we will
22 probably have to appeal it, but in terms of the protections
23 granted we would ask for that clarification.

24 SPECIAL MASTER ESSAKI: Mr. Wolfson, I happen to
25 think that that is a significant improvement on my

1 suggestion.

2 Mr. Williams, do you have any problems with having
3 the data maintained at the offices of an OEM-designated agent
4 such as their lawyer or in one of the GM offices?

5 MR. WILLIAMS: Your Honor, I do think it creates an
6 additional burden. I think what you have proposed is an
7 extraordinarily high level of protection that limits access
8 of this to virtually no one involved in the case. If now our
9 people have to travel to someone else's offices I would
10 object to that, and if that's going to happen then I would
11 want to know they have access to that whenever they want it,
12 they don't have to go through hurdles, the expenses if they
13 need to travel to these locations around the country to look
14 at this, I don't think that should then be borne by us
15 because I think the procedures that Your Honor has put in
16 place sufficiently protect the information, and I don't think
17 it is fair to the parties for critical information in the
18 case to have us needing to make phone calls, get on planes,
19 travel and sit in their office with someone watching what we
20 are doing while we are looking at this information.

21 This is key information to a disputed factual issue
22 in the case that even with the protections you have put in
23 place those using this, and at this point under Your Honor's
24 order just the experts, they need the ability to actually
25 work with it in a normal manner, not as if they are visiting

1 || a prisoner in a jail.

2 SPECIAL MASTER ESSHAKI: Mr. Hemlock, how many
3 prisoners have you visited in a jail?

4 MR. HEMLOCK: None yet but I am working on it.

5 SPECIAL MASTER ESSHAKI: I have, sir, it is not a
6 comfortable site.

7 MR. HEMLOCK: I am sure. I have an idea, and I'm
8 going to credit Mr. Cherry with this. What if Your Honor,
9 forgive me, I have not had a chance to discuss it with
10 plaintiffs yet so I can't say it is acceptable to them, what
11 if we did the following: On the plaintiffs' side only one
12 firm were to be the custodian of the documents to be produced
13 by the OEMs. In other words, for each plaintiffs' group --

14 SPECIAL MASTER ESSHAKI: You're off of the security
15 issue now, all right.

16 MR. HEMLOCK: No. I'm trying -- I'm back to
17 limiting the number of eyes on the documents.

23 MR. HEMLOCK: I don't think it is doable, I agree
24 with Mr. Williams. In the heat of preparing for class
25 certification and looking at documents, I'm sure Your Honor

1 has been there, it is just not realistic for us to have to
2 travel to another office, look at documents, take notes on
3 them. It would meaningfully impede the serving parties'
4 efforts to adjudicate the case, but my idea --

5 SPECIAL MASTER ESSHAKI: Please, would you stop
6 right there.

7 Anyone else want to address Mr. Wolfson's
8 suggestion to revise my security proposal? Yes. Counsel,
9 come forward and state your name.

10 MR. ELLIS: Abram Ellis for certain defendants in
11 later-filed cases.

12 One issue that was not raised by Mr. Williams or
13 Mr. Hemlock but is crucially important is ensuring that for
14 any data that is held on those -- at those sites can be
15 manipulated by the right programs and be analyzed and
16 assessed in the appropriate way, and in addition to the
17 imposition of burdens associated with just the logistical
18 aspects is making sure they can do whatever they want with
19 the data on a computer that is not theirs and a system that
20 is not theirs.

21 SPECIAL MASTER ESSHAKI: I understand. Anyone else
22 need to speak on this issue?

23 MR. WILLIAMS: I apologize because I'm going to
24 actually repeat what he said but he's exactly right. This
25 proposal actually would prevent our experts from being able

1 to do what they have to do, period. If the stuff is resident
2 on their system much of this data is going to have to be put
3 into programs and used for computer modeling and regression
4 analyses. We can't go to General Motors' office and use
5 their computers to do that, it just can't be done.

6 SPECIAL MASTER ESSHAKI: Mr. Wolfson.

7 MR. WOLFSON: Just offering a practical from
8 experience in cases where we have had very, very large cases
9 with multiple experts, Apple, Samsung, you know, some of the
10 largest cases in recent litigation history, this is how it is
11 done for hypersensitive materials. And this -- for us, this
12 is very, very critical information and we do want to be able
13 to control it. To the extent that there are copies that need
14 to be made, that they want to be made that are logged, we
15 believe that is doable, but to the extent that there are just
16 going to be thumb drives -- for the first case there are ten
17 defendants as I understand from yesterday plus all plaintiff
18 groups, that would be thumb drives to each law firm, and,
19 again, I mean, just in this room alone right now that's more
20 than people at General Motors that have access.

21 SPECIAL MASTER ESSHAKI: I think we are confusing
22 what I would call the crown jewel data from other pricing
23 data, so let's try to just focus on the crown jewels data.

24 Let me ask you this, Mr. Wolfson, calling on your
25 experience in these cases, if an expert witness were to come

1 to your office with his own laptop and you inspect it and can
2 confirm that it is not Internet accessible and that no one
3 can get into that laptop, would you then envision he could
4 use the thumb drive as opposed to having him come to your
5 office and having to use a laptop that is at the office of
6 one of your attorneys?

7 MR. WOLFSON: So the problem --

8 SPECIAL MASTER ESSHAKI: That guarantees there is
9 no manipulation programs -- data manipulation problems before
10 they start the search.

11 MR. WOLFSON: Right, and then all work is done on
12 site?

13 SPECIAL MASTER ESSHAKI: All work is done on site.

14 MR. WOLFSON: And the data is not taken away?

15 SPECIAL MASTER ESSHAKI: Data is not taken away.

16 MR. WOLFSON: I think that that's more doable, and
17 the devil is in the detail on how we would set up the
18 protective order on this, but something along those lines I
19 think is better than having the data go out, be put on to
20 these systems, it may be perfectly fine on the thumb drive
21 itself but then put on these expert systems that are then
22 presumably going to be hooked into some sort of either
23 internal network or accessible to an outside network, so I do
24 think --

25 SPECIAL MASTER ESSHAKI: No. My original proposal

1 was they were standalone computers, no Internet access, no
2 access whatsoever from the outside into that computer.

3 Mr. Williams.

4 MR. WILLIAMS: A couple of points, Your Honor. I
5 do have grave concerns about the proposal being offered by
6 General Motors. I don't want to differentiate the data
7 issues from what Mr. Hemlock described as the documents with
8 words issue because on the data issues there is no doubt in
9 my mind that it is simply not possible to do what's being
10 suggested, that we go do their office, bring a laptop and do
11 the type of regression analyses with very complex computer
12 models that have to be done in this case, it can't be done.

13 Secondly, I would ask through the court, to the
14 extent counsel is saying this is done routinely in cases, I
15 can certainly represent it has not been done in any of my
16 cases, I'm pretty sure it has not been done in any of the
17 cases defendants are in. If we could be told what those
18 cases are, were they antitrust cases with regression analyses
19 being performed on vast amounts of data or were they very
20 different types of cases where those types of concerns
21 weren't present because I think that's going to inform this
22 analysis, but I can represent to the Court nothing like this
23 has been done in any of the antitrust cases that I have been
24 involved in.

25 SPECIAL MASTER ESSHAKI: Mr. Hemlock.

1 MR. HEMLOCK: I agree completely. The other point
2 I would make, Your Honor, is that the work that's done with
3 this data it is not a question of just a day or two of just
4 tinkering with it and coming up with a report. I mean,
5 experts work with this stuff for weeks. We would have people
6 camped out at General Motors for weeks on end, and I agree it
7 is not doable.

8 Let me, if I may, make a proposal that I think may
9 balance all of this and may be useful. On the data I think
10 we should continue with Your Honor's proposal. Now, counsel
11 for GM pointed out that there may be multiple defendants and
12 thus multiple experts. I can tell you in the
13 anti-vibrational part case we have four defendants but we
14 have one expert who would look at this, maybe two, but I bet
15 we could come to some resolution on the number of experts
16 that need to see this information per parts case.

17 Two, again, most of these cases don't have experts
18 yet, they don't even have discovery yet, so we are not going
19 to be sending the data out to a million different people. On
20 the documents, again, Mr. Cherry had a very good idea, what
21 if on the plaintiffs' side one firm from each plaintiffs'
22 group, one EPP, one DPP firm, et cetera, got access -- I
23 guess the DPPs wouldn't need it.

24 SPECIAL MASTER ESSHAKI: Mr. Hemlock, please, what
25 I would like to do is finish on the data side first.

1 MR. HEMLOCK: Okay. So I think I have made my
2 point.

3 SPECIAL MASTER ESSHAKI: You have made your point.
4 Let me just say the following: I have been struggling with
5 this for a month. I know how critical, how confidential, how
6 damaging the release of this -- of the crown jewel
7 information can be to the OEMs, and my initial inclination
8 was to deny it in total. However, I also concluded that if I
9 denied it in total there was a significant, if not a
10 substantial, likelihood that I would destroy the passthrough
11 arguments that the parties could make or contest, and that's
12 why I wanted to give the parties the data because, as I said,
13 the overwhelming issue in my mind is the size of the
14 conspiracy, the damage that has been done to 75 million
15 automobile purchasers that has to be redressed, that's why I
16 decided to give the data.

17 Mr. Wolfson, I'm going to give the data as I
18 originally indicated without your suggestion, and you can
19 present that suggestion when you appeal the order to
20 Judge Battani and see if she believes that necessary --
21 additional security is necessary. But I want to clarify,
22 when I said thumb drive or disk, it was encrypted, password
23 protected, experts' eyes only. All right. We have concluded
24 that now, so let's talk about the documents.

25 MR. HEMLOCK: Thank you.

1 SPECIAL MASTER ESSHAKI: Your suggestion on the
2 documents.

3 MR. HEMLOCK: My suggestion on the documents would
4 be one firm on the plaintiffs' side, one firm per plaintiffs'
5 group, and, again, I haven't reviewed this with Mr. Williams
6 so he will tell me if he agrees. On the defendants' side I
7 would say for each part case perhaps only one defense firm
8 has physical possession of the documents, and to the extent
9 that members of the other firms want to come look at it, take
10 notes, et cetera, they could do so, but realistically in each
11 parts case one firm could probably take the lead on briefing
12 that aspect of class cert, that aspect of other parts of the
13 case, and thus you would really have significantly fewer
14 firms and eyeballs on the documents themself.

15 SPECIAL MASTER ESSHAKI: Mr. Williams, you just
16 heard this proposal?

17 MR. WILLIAMS: I have heard the proposal and I
18 support it. I think it alleviates the concern on the
19 document side that this goes to a disputed factual issue that
20 is central to the case, and if the attorneys are not
21 permitted to have access to the information to evaluate it we
22 won't be able to prove or disprove those issues that are so
23 central to whether or not these cost increases were, in fact,
24 passed through to the 75 million people who purchased these
25 cars.

1 SPECIAL MASTER ESSAKI: I understand that.

2 Mr. Wolfson, a comment on this?

3 MR. WOLFSON: Your Honor, I think that this is
4 actually even more appropriate for the on-premises suggestion
5 that I made. These are the documents that actually described
6 the methodology used by the OEMs. These are the documents
7 where if they get out they are understood by a layperson,
8 whereas the data is something more than even while still
9 extremely sensitive is something that requires a bit more
10 analysis. If the attorneys would like to look at these
11 documents and review them as they are put together and
12 assembled, I think this would be appropriate to review on
13 premises, controlled on an Internet-less computer at a
14 General Motors' attorney's office or at some other OEM's
15 office wherever they keep their data -- or their documents.

16 SPECIAL MASTER ESSAKI: Mr. Hemlock, instead of
17 Ms. Romanenko having to come visit Mr. Williams' office,
18 Ms. Romanenko would have to go to the attorney for General
19 Motors in Detroit.

20 MR. HEMLOCK: Again, Your Honor, the realities of
21 litigation, of briefing cases, of multiple parties working
22 together and coordinating, the thought that if they needed to
23 double check a document to make sure it is accurate when it
24 is cited in a brief and a representation to the Court as to
25 the substance of those documents, they have to go call GM,

1 get on a plane, fly over there, to me it is unrealistic.

2 SPECIAL MASTER ESSAKI: Mr. Williams, I assume you
3 agree?

4 MR. WILLIAMS: I do, Your Honor.

5 SPECIAL MASTER ESSAKI: That's sufficient.

6 MR. WILLIAMS: Thank you. Thank you.

7 SPECIAL MASTER ESSAKI: A bright man knows when to
8 agree with another bright man, I guess.

9 All right. I am going to accept the parties' most
10 recent suggestion as to this one as well. I do understand
11 that it could present an insurmountable task, especially for
12 people that are in San Francisco or in California, if they
13 need to check a particular document and they have to fly to
14 Detroit to check a one- or two-page document in order to
15 finish off the writing of their cert brief, it is -- it does
16 present a very significant burden.

17 I am going to accept the proposal to designate one
18 firm as the keeper of the documents. That firm will execute
19 an affidavit indicating that they have received the
20 documents. They will agree not to copy the documents unless
21 it is necessary for them to do studies, in which event they
22 will keep a strict record of every copy that is made, who it
23 was made by, the date and time it was made. It can only --
24 now, is this going to be -- I'm assuming it is not going to
25 be hard copy, it will be some sort of electronic documents.

1 MR. HEMLOCK: I guess that depends. I think while
2 certainly our preference would be to produce it
3 electronically but we would take the appropriate precautions
4 anyway.

5 SPECIAL MASTER ESSHAKI: If it is electronically it
6 is going to be again thumb drive or disk, encrypted, password
7 protected. A log must be maintained of every attorney who
8 accesses the data, the name of the attorney, the party they
9 represent, the date, the time, the length that they accessed
10 the data, and that if it is electronically produced via thumb
11 drive or disk it has to be on a freestanding computer that is
12 not connected to the Internet, that no one else can enter --
13 you know, can enter into that computer except when they are
14 sitting at the desk with that computer.

15 Mr. Wolfson, again, it is a very worthy suggestion
16 and I suggest you give it to the Judge for her consideration,
17 but I'm dealing with the practicalities of it; you can't put
18 somebody on a plane and say go check document number 1237 for
19 this section, it is not doable, so I will give as much
20 protection as I possibly can.

21 Mr. Williams?

22 MR. WILLIAMS: Thank you, Your Honor. One point
23 briefly I just want to note, which is we understand the
24 limitations that Your Honor is imposing at this point. At
25 some time these documents might become subject to either

1 briefing in the Court or testimony in the Court, and I just
2 want to note at that time the parties and the producing
3 parties should address it then and present proposals to how
4 to address this so that this isn't a matter of this is how
5 this will be kept forever because there might come a time at
6 which this becomes central testimony at the trial of this
7 case.

8 SPECIAL MASTER ESSHAKI: We may be having
9 confidential hearings, I understand.

10 Ms. Romanenko.

11 MS. ROMANENKO: Your Honor, just a quick
12 clarification. I had understood that Mr. Hemlock had
13 proposed that it be one firm for defendants and one firm for
14 each plaintiff group, one firm for EPPs, one firm for ADPs,
15 one firm for DPPs that would get a copy of these documents.
16 I just want to make sure that understanding is correct?

17 SPECIAL MASTER ESSHAKI: Is that clear, sir? That
18 understanding is good. I would --

19 MR. WILLIAMS: Did you say DPPs?

20 MS. ROMANENKO: I did say DPPs.

21 MR. HEMLOCK: Not DPPs.

22 SPECIAL MASTER ESSHAKI: Not DPPs.

23 MS. ROMANENKO: Than ADPs and --

24 SPECIAL MASTER ESSHAKI: Okay. I need a volunteer
25 to draft this most recent order. Mr. Hemlock, thank you very

1 much.

2 So what I'm looking for is literally three orders.
3 One is the general order that I just recited, two is the
4 special secured, confidential crown jewel order involving the
5 crown jewel data that's being given to experts, and the third
6 is the special secured document data pricing information that
7 is going to be held by a limited number of attorneys in the
8 case. All three of those have to contain provisions that
9 permit the appeal to Judge Battani.

10 All right. Can we take ten minutes to give our
11 court reporter a break? Yes, sir?

12 MS. ROMANENKO: Your Honor, I'm more than happy --

13 SPECIAL MASTER ESSHAKI: Mr. Nissan is what I
14 recall your name.

15 MR. CAULEY: Paul Cauley, Your Honor.

16 I am not against court reporters having breaks or
17 anybody having breaks, but I did want to be heard on one
18 minor aspect of the general order on cost shifting which I
19 did not hear addressed and would like to bring to the Court's
20 attention. I am more than happy to do it before or after the
21 break.

22 SPECIAL MASTER ESSHAKI: You certainly may. Let's
23 do it right now because I would like to close this up right
24 now. Let me just suggest, sir, as you get older you are
25 going to find the need for breaks become more and more

1 paramount.

2 MR. CAULEY: Judge, I'm sorry, I am already there.

3 SPECIAL MASTER ESSHAKI: Yes, sir. Please identify
4 yourself again.

5 MR. CAULEY: Paul Cauley on behalf of Nissan, Your
6 Honor.

7 In your cost shifting order I know that you
8 addressed the 30(b) (6) depositions, you addressed all of the
9 production costs that would be incurred by employees of the
10 OEMs, and you also addressed the issue of legal fees in
11 conjunction with that.

12 You will recall from many of our discussions and
13 some of the things that Nissan has indicated a willingness or
14 that it could do to generate some of this data to try to get
15 it in a position that we can give it to the parties will
16 involve us having to actually retain consultants.

17 SPECIAL MASTER ESSHAKI: Sir, I did say -- I did
18 say outside services.

19 MR. CAULEY: So --

20 SPECIAL MASTER ESSHAKI: If you have to retain
21 people to assist you to gather the data off of your systems
22 or whatever it may be, yes, that falls within the confines of
23 the 70 percent as well as the reproduction cost or the
24 regeneration cost itself.

25 MR. CAULEY: We certainly understand your ruling.

1 That aspect we would certainly argue should be 100 percent
2 since we are having to come out of pocket for that, but we
3 understand the ruling.

4 SPECIAL MASTER ESSHAKI: Thank you very much, sir.

5 || I appreciate it. Not quite done, Robert.

6 Ms. Metzger, please identify yourself.

7 MS. METZGER: Kimberly Metzger for Subaru of
8 Indiana.

9 One issue that we would like to address with regard
10 to cost shifting is the cost associated with narrowing the
11 scope of the subpoena, so the preproduction costs, employee
12 labor time, that sort of thing, outside of the scope of the
13 30(b)(6) depositions because they were other of those types
14 of -- as noted in our brief, our responsive brief, there were
15 other costs that Subaru at least incurred in narrowing the
16 scope of the subpoena. I'm sure the parties will call it
17 resisting the subpoena, but it is actually within the scope
18 of 45(d) where the court must enforce the duty to narrowly
19 prescribe the subpoena and to avoid imposing undue burden and
20 expense.

21 So for the cost that Subaru incurred from the
22 beginning of the subpoena when we received the subpoena back
23 in 2015 up until the present time of getting to the point
24 where the scope is the somewhat narrowed still, as you
25 recognize, overly or largely burdensome, what are we going to

1 do about those costs?

2 SPECIAL MASTER ESSHAKI: Any thought on that from
3 the moving parties?

4 MR. WILLIAMS: Yes, Your Honor. We object to that.

5 SPECIAL MASTER ESSHAKI: Mr. Williams.

6 MR. WILLIAMS: Those costs -- first of all, the
7 Court has recited the history of this matter, the 18 months
8 that we spent from the start of this in this courtroom when
9 Judge Battani directed us to work together, and this is
10 something unprecedented in my experience that we have worked
11 together in this manner, we reached out and we tried to talk
12 with these OEMs. We didn't know what they had, and as Your
13 Honor has noted, when we came to see you in March most of
14 them didn't know what they had, so we couldn't have been
15 expected to have drafted a precise focused subpoena that
16 understood what, for example, SIA had because we had no
17 ability to know that.

18 When we served it we did it based upon the best
19 analysis and the best understanding we had, and we invited
20 them to talk with us to help us understand. And in our view,
21 and we don't have to recite it, it doesn't have to be
22 decided, but we think it took an extraordinary long time to
23 have what should have been more straightforward discussions
24 about what they do and don't have, and we don't think that it
25 is fair to then say they should be paid the time they spent

1 to do what normally is done in meet and confer, and what we
2 invited and asked them to do in the meet and confer.

3 SPECIAL MASTER ESSHAKI: Mr. Williams, thank you.

4 Ms. Metzger, please, you can bring it up with
5 Judge Battani on appeal.

6 MS. METZGER: It is not a foreclosed issue?

7 SPECIAL MASTER ESSHAKI: It is foreclosed but she
8 has the right to reverse me. It is not -- those costs are
9 not going to be allocated or shifted in any manner to the
10 moving parties, the legal fees incurred in connection with
11 the attempt to narrow down the subpoena. Only -- I have only
12 addressed the 30(b) (6) deposition costs which included legal
13 fees at 60 percent, and I have only addressed the cost of the
14 productions on a go-forward basis which includes employee
15 time, outside services, reproduction costs, but not including
16 legal fees and in-house or outside, at 70 percent, so that is
17 not being included.

18 MS. METZGER: Just to be clear in case I wasn't,
19 the argument I was making was not for outside counsel fees,
20 it was for actual costs incurred by the parties.

21 SPECIAL MASTER ESSHAKI: I understand, I
22 understand. So if you want to put that in your challenge to
23 my order, that's perfectly fine, I should have included it
24 and did not.

25 MS. METZGER: Thank you.

1 SPECIAL MASTER ESSAKI: I abused my discretion.

2 All right. We will come back about 11:00. Shall
3 we start with General Motors? They were first on our list
4 yesterday.

5 MR. WILLIAMS: I think that's fine. I would like
6 to ask one question to clarify though. During this break I
7 think it would benefit the parties if we could just review
8 the order and see if there's any of the issues you raised
9 that we might want to speak to you about very briefly.

10 SPECIAL MASTER ESSAKI: How much more time?

11 MR. WILLIAMS: I think the ten minutes will still
12 work.

13 SPECIAL MASTER ESSAKI: Let's reconvene at 11:15.
14 All right.

15 (At 10:48 a.m., brief recess.)

16 - - -

17 (At 11:16 a.m. proceedings reconvene.)

18 SPECIAL MASTER ESSAKI: Back on the record with
19 respect to the matter we just heard. I understand there are
20 some questions that need clarification. Mr. Williams?

21 MR. WILLIAMS: Yes, Your Honor. Thank you. There
22 are a couple points we want to clarify.

23 The first one we are going to talk about concerns
24 the cost issues. First, as to your ruling that the parties
25 would bear a certain percentage of the cost of the

1 depositions, of the 30(b)(6) depositions, we wanted to ask to
2 clarify, what does that extend to?

3 SPECIAL MASTER ESSHAKI: That includes --

4 MR. WILLIAMS: Is that the actual deposition or --

SPECIAL MASTER ESSHAKI: That includes the employee time for participating and it includes obviously the transcripts, and it includes the legal fees incurred in preparing the witness to testify at 60 percent.

9 MR. WILLIAMS: Your Honor's ruling all fees
10 incurred to prepare the witness to testify and counsels'
11 attendance at the deposition?

12 || SPECIAL MASTER ESSHAKI: Yes.

13 MR. WILLIAMS: Okay. The second aspect of this,
14 and this relates both to what you just described as well as
15 cost of production, we believe it would be appropriate that
16 the parties have an opportunity to review --

21 MR. WILLIAMS: Thank you.

22 SPECIAL MASTER ESSHAKI: Outside counsel fees.

23 MR. WILLIAMS: The parties request as to both this
24 and as to the vendors' cost that we should have an
25 opportunity to review --

1 SPECIAL MASTER ESSAKI: The reasonableness.

2 MR. WILLIAMS: -- the reasonableness and comment on
3 those, rather than simply submitting a bill.

4 And then a related point as to the vendors and
5 production cost, to the extent this has not yet been done, in
6 all the cases IPP reviewed in preparing for today where this
7 issue has come up, the serving party if costs were shifted
8 had some opportunity to evaluate proposals and have input
9 into what was done and how it was done, and we think in this
10 instance all of our firms routinely retain the same types of
11 discovery vendors that the OEMs will probably be seeking. We
12 would like the opportunity before any contracts are signed to
13 be part of that process because it might be, for example, if
14 they all need to do it we can secure one vendor to do it for
15 all of them at a cost savings, and we think we should be
16 given that opportunity.

17 SPECIAL MASTER ESSAKI: That's reasonable, and I
18 will accept that, and when we draft the order please insert
19 that. When I referenced the fees and costs of the 30(b) (6)
20 deps or the fees and costs of the production I mean the
21 reasonable fees and costs, and I agree that if there are
22 going to be outside vendor contracts issued that you have the
23 right to participate in establishing the reasonableness of
24 those fees, and also with respect to the charges for internal
25 employees you need to be advised in advance.

1 MR. WILLIAMS: Thank you, Your Honor.

2 SPECIAL MASTER ESSHAKI: Anyone else have an issue?

3 Yes, sir, please identify yourself for the record.

4 MR. ELLIS: Abram Ellis on behalf of Standard
5 Electric and the Diamond Electric defendants.

6 One point of clarification, Your Honor, on the
7 extra confidentiality protections you have granted the OEMs.
8 We certainly don't want to take any action, assuming you are
9 not suggesting that the protective order that is already in
10 place is insufficient to cover, for example, the parties' own
11 confidentiality. We, of course, have produced sensitive
12 documents, the plaintiffs have and plaintiffs will be
13 producing sensitive documents, the defendants and we are all
14 comfortable, of course, with the protective order in place.
15 In light of that, some of the OEMS have already been
16 producing documents pursuant to the protective order, and our
17 operating assumption is that those documents have sufficient
18 protection already and that those categories of documents
19 that have already been produced are not in need of this extra
20 protection.

21 SPECIAL MASTER ESSHAKI: You are absolutely
22 correct. This is a, quote, crown jewel extra security
23 precaution for the pricing information.

24 MR. ELLIS: Thank you.

25 SPECIAL MASTER ESSHAKI: Mr. Wolfson?

1 MR. WOLFSON: Thank you, Special Master.

2 Just on this provision about the input into what
3 document vendors the OEMs chose, I just want to make sure
4 that we have the ability to choose the vendor of our choice.
5 There are some vendors that may not be involved in this case
6 but the OEMs use on a regular basis, but the parties can have
7 some input perhaps into the pricing for that or just say we
8 think it is reasonable or unreasonable.

9 SPECIAL MASTER ESSHAKI: You will have the ultimate
10 say-so, on the other hand if they can beat the price with a
11 reputable company then you have to match the price because
12 I'm sure General Motors can command the lowest price in town
13 on document reproduction.

14 MR. WOLFSON: Just want to make sure we have that
15 authority.

16 SPECIAL MASTER ESSHAKI: Is that acceptable,
17 Mr. Williams?

18 MR. WILLIAMS: Yes, Your Honor.

19 SPECIAL MASTER ESSHAKI: You are doing the orders,
20 Mr. Hemlock, you are doing the orders, three of them?

21 MR. HEMLOCK: I don't know that we --

22 SPECIAL MASTER ESSHAKI: Well, yes, three orders.

23 MR. HEMLOCK: Yes. We were going to take on two of
24 them. We will figure it out, Your Honor.

25 SPECIAL MASTER ESSHAKI: Ms. Romanenko is doing 31?

1 MS. ROMANENKO: Correct.

2 SPECIAL MASTER ESSHAKI: And I asked you to do,
3 one, the general order, two, the crown jewel order, and,
4 three, the data order.

5 MR. HEMLOCK: We will get them.

6 SPECIAL MASTER ESSHAKI: Okay. You can enlist
7 someone to assist you.

8 MR. WILLIAMS: Thank you.

9 SPECIAL MASTER ESSHAKI: Yes, Ms. Romanenko.

10 MS. ROMANENKO: Your Honor, just on request
11 number 31, I want to very quickly address the issue of timing
12 of production. We would like to request 30 days, we think
13 that's more time than, for instance, sometimes defendants
14 have requested while moving to compel against dealerships.

15 SPECIAL MASTER ESSHAKI: It will be fine to give it
16 to you for 30 days, absolutely, but I can anticipate you are
17 going to be arguing this in January before Judge Battani.

18 MS. ROMANENKO: Thank you.

19 SPECIAL MASTER ESSHAKI: All right. Can we now
20 take the parties and adjourn into the jury room and have our
21 court reporter join us.

22 (At 11:22 a.m., brief recess.)

23 - - -

24 (At 11:26 a.m. proceedings reconvene.)

25 SPECIAL MASTER ESSHAKI: This is a continuation of

1 our motion hearing on the parties' motions to compel
2 production of documents from the original equipment
3 manufacturers.

4 I have made an overarching ruling on this motion,
5 and now we are going to address on an OEM-by-OEM basis a
6 particular order involving that OEM and the moving parties.
7 These discussions grew out of the mediation sessions that
8 occurred yesterday, and in some instances back in November.

9 So who would like to -- we are starting with
10 General Motors. Who would like to start with General Motors?
11 I have in front of me an outline of category of documents and
12 the positions of the parties.

13 Sir, please identify yourself.

14 MR. KLEIN: Sheldon Klein, counsel for Tokai Rika
15 parties, and here speaking on behalf of the defendants and
16 other parties.

17 SPECIAL MASTER ESSHAKI: Okay.

18 MR. KLEIN: I'm glad to report we have an agreement
19 on all terms. After discussing on the term sheet or whatever
20 we are going to call the document there was one open issue,
21 but I spoke with Mr. Wolfson after your ruling this morning
22 and he believes, and I concur, that that issue was
23 essentially resolved in light of your issues -- in light of
24 your ruling. I don't know if you want us to read this into
25 the record or --

1 SPECIAL MASTER ESSAKI: No, no. Mr. Wolfson
2 though is anxious to speak.

3 MR. WOLFSON: Yes, just one issue on that. The
4 profitability summary reviews are the pricing methodology
5 documents, and this is -- sorry, I wanted to address one
6 issue with that.

7 The -- they are not centrally kept, they are kept I
8 believe the testimony established by a custodian, so I think
9 what we need to work out is how we go about finding them if,
10 as again, with respect to the order, if Judge Battani upholds
11 that portion of the order that we have to produce them.

12 SPECIAL MASTER ESSAKI: All right. Let me ask
13 this in order so that we don't have to read this into the
14 record, can we submit this as an exhibit to the record and
15 have it marked confidential, is that acceptable? That way we
16 will know what it is and the Judge will know what it is, and
17 if there is any dispute it is in the record. Acceptable,
18 Mr. Klein?

19 MR. KLEIN: Acceptable to me.

20 SPECIAL MASTER ESSAKI: Mr. Wolfson?

21 MR. WOLFSON: Yes, Your Honor -- or Special Master.

22 SPECIAL MASTER ESSAKI: Any other issues you may
23 have, sir?

24 MR. WOLFSON: That the profitability summary
25 reviews were the only open issue from what I understand.

1 SPECIAL MASTER ESSHAKI: Mr. Williams?

2 MR. WILLIAMS: Well, I have a very small
3 housekeeping point. Judge Battani has been very concerned
4 that we follow the appropriate procedures for sealing, so I
5 think we will work with you to submit to Judge Battani the
6 findings she will need to make so she can seal the record.

7 MR. KLEIN: And just for clarity, it will be on
8 page 2 of what was submitted to you, and you will see that
9 for --

10 SPECIAL MASTER ESSHAKI: We will refer to this as
11 General Motors' Exhibit A.

12 MR. KLEIN. Okay. You will see that for each of
13 the boxes we indicate what's agreed, what's not agreed. What
14 wasn't agreed as of the time we printed up this document is
15 the profitability summary reviews, but I want to make clear
16 that that also -- it is also the monthly pricing review decs,
17 and it is based on your ruling as to the protocol for
18 producing the crown jewels, that's the basis on which we now
19 conclude that it is -- that it is resolved. Is that fair?

20 MR. WOLFSON: As to the substance but what I
21 understood is the -- from the ruling that we can't have
22 wholesale custodian searches and that we would negotiate at
23 most a handful, so to the extent that we would do so in order
24 to find these decs that I think is the area of open
25 discussion remaining.

1 MR. KLEIN: Understood. That's consistent with the
2 order this morning so --

3 SPECIAL MASTER ESSHAKI: All right. Counsel, I
4 appreciate your good work.

5 MR. WOLFSON: Thank you.

6 SPECIAL MASTER ESSHAKI: Thank you very much.

7 MR. WOLFSON: Thank you Special Master.

8 SPECIAL MASTER ESSHAKI: Do we have any other
9 wholesale agreements that we can take and get off of this
10 docket, or are there contested ones only?

11 MR. HEMLOCK: Your Honor, I think with respect to a
12 couple of the OEMs we had discussed yesterday the notion of
13 not seeking a ruling today but rather waiting until next week
14 and if we couldn't wrap up the agreement we would put in very
15 brief letter statements.

16 SPECIAL MASTER ESSHAKI: Correct.

17 MR. HEMLOCK: So that I think is the case with
18 respect to Toyota and Honda, if I am right. Any others? No.
19 So in that regard I don't know how you want to proceed
20 with --

21 SPECIAL MASTER ESSHAKI: How do we stand with
22 Nissan?

23 MR. ELLIS: Your Honor, if we were given a few
24 minutes to confer with Nissan's counsel I suspect we will get
25 close to -- we will know if we are at a baked deal or not.

1 SPECIAL MASTER ESSHAKI: Okay. Counsel, please
2 identify yourself.

3 MR. ELLIS: I'm sorry. Abram Ellis, counsel for
4 Standard Electric and Diamond Electric.

5 SPECIAL MASTER ESSHAKI: Do you want to go into the
6 jury room and ask the Nissan counsel to meet you in the
7 hallway and --

8 MR. ELLIS: I will do that.

9 SPECIAL MASTER ESSHAKI: So we will defer on Nissan
10 at this point. We had an agreement with respect to
11 Honda North America as a result of the November mediation,
12 correct?

13 MR. HEMLOCK: Well --

14 SPECIAL MASTER ESSHAKI: We did.

15 MR. HEMLOCK: I think we thought we maybe did or
16 the parties thought so, but as is sometimes the case I think
17 looking at it more closely some issues arose but, again, I do
18 think that with Honda my colleague --

19 SPECIAL MASTER ESSHAKI: Counsel, I said Honda
20 North America, not Honda Indiana of America.

21 MR. HEMLOCK: Oh, I'm sorry --

22 MS. METZGER: It is Subaru of --

23 SPECIAL MASTER ESSHAKI: I'm so sorry. My fault.

24 MR. HEMLOCK: Subaru of America we are done.

25 SPECIAL MASTER ESSHAKI: And we are moving towards

1 an order?

2 MR. HEMLOCK: On Subaru of America I believe that's
3 the case.

4 MR. AMATO: Subaru of Indiana. I'm Jeffery Amato.

5 SPECIAL MASTER ESSHAKI: Mr. Amato, yes, I'm aware
6 that Subaru of Indiana is here and they need to be addressed,
7 but in November as a result of the mediation we reached I
8 believe an agreement with Subaru of America.

9 MR. AMATO: That's right, and I don't think that
10 their counsel --

11 SPECIAL MASTER ESSHAKI: They are not even here,
12 but I'm asking -- inquiring are we working towards an order
13 on them?

14 MR. AMATO: Yes, we can submit it.

15 SPECIAL MASTER ESSHAKI: Okay. All right.

16 MR. HEMLOCK: So in light of that I don't know if
17 Chrysler might be the next appropriate --

18 SPECIAL MASTER ESSHAKI: Yes. So you told me that
19 Nissan is going to need a few more minutes and you told me
20 that it is Honda and Toyota that may have an open issue and
21 we will get to a letter format if we have to.

22 MR. HEMLOCK: Exactly.

23 SPECIAL MASTER ESSHAKI: Okay. Can somebody ask
24 the representative of Honda to please join us?

25 Mr. Hemlock, I did not mean to make you my errand

1 boy. I apologize.

2 MR. HEMLOCK: I have done worse.

3 SPECIAL MASTER ESSHAKI: I can't tell you how many
4 cups of coffee I made as an associate. In those days we had
5 percolating pots too.

6 MR. HEMLOCK: I can't tell you how many I drank.

7 SPECIAL MASTER ESSHAKI: Counsel, please identify
8 yourself.

9 MR. PURCELL: Yes, sir. Dan Purcell from Keker &
10 VanNest for the Honda entities.

11 SPECIAL MASTER ESSHAKI: And do we have an outline?

12 MR. ROWE: Yes, Your Honor. David Rowe for Sanden
13 International USA on behalf of the requesting parties to
14 address the Honda issues.

15 SPECIAL MASTER ESSHAKI: Okay. Do we have a copy
16 of an outline for me?

17 MR. ROWE: We do, Your Honor. And to get
18 Mr. Purcell up to speed, because I don't think he was in the
19 courtroom a few minutes ago, we discussed, Dan, attaching
20 these outline notes to the record so that it will be more
21 clear what the parties are agreeing on.

22 SPECIAL MASTER ESSHAKI: But only as a sealed
23 exhibit and we know we have to go through the hoops to make
24 them a sealed exhibit.

25 MR. PURCELL: That's fine. I mean, I do think that

1 what was agreed by the parties in the course of mediation, I
2 assume Your Honor is going to -- Special Master is going to
3 essentially make that part of a written order directing Honda
4 and the other OEMs to comply with what was agreed.

5 SPECIAL MASTER ESSHAKI: I am expecting that the
6 parties will draft an order as to each specific OEM, that the
7 OEM will sign off on the order at least as to form, I will
8 have the order entered and we will have to again I believe
9 make it subject to confidentiality, seal it, and then it will
10 be subject to your right to appeal or the moving party's
11 right to appeal.

12 MR. PURCELL: That was one thing I wanted to check
13 on and it sounds like that that's -- we are all on the same
14 page, that it will be appealable. My client is a little
15 uncomfortable with something that's agreed to in mediation
16 and sort of losing the force of an appeal, we don't want to
17 be waiving our right to appeal something to Judge Battani
18 just because it was an accommodation that we reached in
19 mediation.

20 MR. ROWE: We are okay making it into a form of an
21 order compelling Honda to produce documents subject to the
22 agreements we have reached in a compromised effort, and, Dan,
23 to give you -- Mr. Purcell, to give you some additional
24 comfort, my idea of attaching the outline to the record is
25 simply to inform the parties' ability to draft the final

1 order. I don't envision this as some sort of formal
2 stipulation at this point that we would necessarily be stuck
3 with.

4 SPECIAL MASTER ESSHAKI: I understand that it is
5 not a formal stipulation that either side is stuck with, but
6 having participated in the mediations yesterday from my
7 perspective it is my decision, I'm exercising my discretion,
8 to adopt that as my order.

9 Mr. Williams?

10 MR. WILLIAMS: I apologize if the response to your
11 question was pending. I would like to ask counsel for Honda
12 through the Court, to the extent an agreement was reached in
13 mediation that would have provided more than the Special
14 Master ruled today, if you could advise, does that mean you
15 will maintain the agreement you made in the mediation with
16 us?

17 MR. PURCELL: We are not expecting to be appealing
18 something that we have agreed to, it is just a question of
19 mediation is a little bit different context from a contested
20 motion and so I assume that both sides would retain their
21 right to appeal any aspects of the Court's order.

22 MR. WILLIAMS: Thank you, Counsel.

23 SPECIAL MASTER ESSHAKI: All right. Counsel, you
24 have an outline for me?

25 MR. ROWE: I do, Your Honor. And based on further

1 discussions with Mr. Purcell this morning I believe it will
2 be prudent to note just a few changes to the written outline
3 that I had given to you, also in light of the rulings that
4 you issued this morning.

5 Looking at -- do we need to mark that as an
6 exhibit?

7 SPECIAL MASTER ESSHAKI: We are going to call this
8 FCA -- no, Honda Exhibit A but it is not going to go into the
9 record physically until the sealing has been completed.

10 MR. ROWE: Okay. Understood. In an attempt to be
11 a little more clear then, referring to Honda Exhibit A, on
12 page 1, the first category under purchase and procurement
13 documents --

14 SPECIAL MASTER ESSHAKI: Yes.

15 MR. ROWE: -- discussing the transactional purchase
16 data, and you will see that Honda had agreed that either has
17 or will produce its -- what it considered its live accounts
18 payable data and it estimated it had about three years worth.

19 In light of the Court's ruling this morning that
20 legacy systems that had reasonably accessible data would also
21 be produced, Honda will be producing older data from those
22 legacy systems to the extent that it can reasonable restore
23 and produce that data.

24 Did I get that right, Mr. Purcell?

25 MR. PURCELL: You did.

1 MR. ROWE: And the next category under the APR
2 related documents?

3 SPECIAL MASTER ESSHAKI: Yes.

4 MR. ROWE: Actually it would be the rebate
5 information.

6 SPECIAL MASTER ESSHAKI: Yes.

7 MR. PURCELL: I think that's included in the APR
8 related document section of the chart.

9 MR. ROWE: Yes.

10 SPECIAL MASTER ESSHAKI: It is the first box, Honda
11 will produce live data showing rebates paid to Honda by AVRP
12 and bearing suppliers.

13 MR. ROWE: Yes. And we had said that there was an
14 open item on whether Honda could access older data.

15 Mr. Purcell reports that Honda's older data would fall within
16 the category of your order announced this morning that does
17 not have to be produced, and so I just wanted to get that on
18 the record to note that that's no longer an open item.

19 SPECIAL MASTER ESSHAKI: Very good. Thank you.

20 MR. ROWE: There is also reference to a database,
21 the cost management system database. We had said it was an
22 open item where Honda was going to give us a representative
23 sample, and then the requesting parties would look at that
24 representative sample and determine whether they needed more
25 data from that database. Honda is representing that the data

1 that is in the CMS database is duplicative of the e-quote
2 database.

3 SPECIAL MASTER ESSHAKI: I heard that yesterday.

4 MR. ROWE: Except for -- perhaps for some bills of
5 material that would be in the CMS database that are not in
6 the e-quote database. Having had that discussion with
7 Mr. Purcell this morning, speaking only for
8 Sanden International, I don't think we need the CMS database
9 but just because of logistics I haven't had a chance to speak
10 with the other serving parties, and not to get us too
11 sidelined but if we could spend 30 seconds to see if we can
12 make an agreement on that or if we need to leave it as an
13 open item, that would be helpful.

14 SPECIAL MASTER ESSHAKI: Off the record? Do you
15 want to go talk to them?

20 MR. PURCELL: Yes. So we have reached an
21 accommodation on the CMS database. The non-duplicative part
22 of that database, which is the bill of materials, the parties
23 are going to get us a list of models for which they want a
24 bill of materials and Honda will produce a bill of material
25 for those models from the CMS database.

1 SPECIAL MASTER ESSHAKI: All right. Any other
2 issues?

3 MR. ROWE: There is an open item on the CSS
4 database, the cost simulation system. Honda has already
5 produced data from full model changes. In the outline we
6 gave you there is an open issue as to whether we want or need
7 data from mid-model changes, and the requesting parties are
8 close to agreeing that we don't need the mid-model changes
9 but the counsel for EPPs are checking on one thing literally
10 at this moment, so if we can give it another minute then we
11 can report on that.

12 SPECIAL MASTER ESSHAKI: We can go back off the
13 record.

14 MR. PURCELL: Well, actually there are a couple
15 issues we can address while we wait for that.

16 SPECIAL MASTER ESSHAKI: Sure.

17 MR. PURCELL: So we heard Your Honor's comments and
18 rulings in the discussion this morning about the crown jewel
19 pricing information. For Honda this is the share drive we
20 were talking about yesterday which has the pricing milestone
21 documents, and yesterday we had agreed as a compromise to
22 produce the pricing milestone documents for the latest
23 full-model change I guess for the Civic or the Accord, one or
24 the other, it is in my notes. We would be willing to produce
25 the pricing milestone documents for full-model changes to the

1 extent that we have it, but we would like to draw the line
2 there.

3 We would like to not produce the rest of the share
4 drive which contains a whole bunch of other irrelevant
5 documents related to design changes, that also has some more
6 trivial documents related to the mid-model changes where they
7 are really not revisiting very much about the model and
8 really not changing the price other than to account for
9 inflation and things like that.

10 SPECIAL MASTER ESSHAKI: Counsel?

11 MR. ROWE: Again, speaking only for Sanden because
12 I haven't had a chance to speak to the other requesting
13 parties, we are okay with that proposal except we would add
14 another request; there was the vehicle invoice breakdown
15 document that Mr. Yumenoto testified to in his deposition, so
16 our proposal would be --

17 THE COURT REPORTER: I'm sorry. The name --

18 MR. PURCELL: It is Y-U-M-E-N-O-T-O.

19 SPECIAL MASTER ESSHAKI: Please, just to make sure
20 the record is clear, start this over.

21 MR. ROWE: Yes, Your Honor. So, again, speaking
22 for Sanden International, because I haven't had a chance to
23 speak to my colleagues, Sanden would be okay with accepting
24 Honda's proposal for the PowerPoints for all of the models,
25 full model changes on all of the checkpoints along the way,

1 plus we would also ask for a document that Barren Yumenoto
2 described as a vehicle invoice breakdown, which is some sort
3 of spreadsheet, so if we could get both of those Sanden would
4 be happy but we need to check with my other colleagues to see
5 if that's a deal that the requesting parties can make as a
6 whole.

7 SPECIAL MASTER ESSHAKI: Can you live with that?

8 MR. PURCELL: I think it depends on the extent to
9 which they are going to ask for additional things. I would
10 hate to open the door and then have a truckload of cattle
11 barge through it, that is something we can consider.

12 SPECIAL MASTER ESSHAKI: Other issue.

13 MR. PURCELL: It is a bad metaphor, I know.

14 So there was a mention in the chart of additional
15 30(b) (6) depositions, we don't think that's appropriate or
16 necessary, we don't think that they have identified any other
17 cost documents or data that they need or that could exist
18 beyond what we have already agreed to produce, which is
19 basically America Honda's purchasing data when it buys the
20 car from the factory and then the sales data when it sells
21 cars to the dealer, that's at the VIN level, we have agreed
22 to produce that. So in the absence of any real showing or
23 even articulation of other information that they need beyond
24 that, a 30(b) (6) depo doesn't seem appropriate to us.

25 MR. ROWE: The requesting parties as of yesterday

1 still were listing this as an open item, and I don't have
2 anything else to report to you on that.

3 SPECIAL MASTER ESSHAKI: All right.

4 MR. PURCELL: And one more thing, and I think this
5 is going to take the sting out of the disagreement we had
6 yesterday about the information that the dealer self reported
7 to us. Again, I don't think this is anywhere near a complete
8 data set, but in a minority of cases dealers do self report
9 sales data to Honda. I am told that that really doesn't have
10 personal identifying information such as the name of the
11 purchaser, the address, it really is just the model and the
12 sales price, and there may be a VIN associated. If that's
13 the case, if the Court orders us to do that we would produce
14 that. Our dealers very much don't want us to so we do object
15 to that, but we understand if the Court orders us to do it we
16 will, and it doesn't seem like we will need to redact any
17 personal information.

18 SPECIAL MASTER ESSHAKI: You have put a smile on
19 Ms. Romanenko's face.

20 Ms. Romanenko.

21 MS. ROMANENKO: Your Honor, yesterday you mentioned
22 giving us a short period for dealerships to object if they
23 did not want the data to be produced, so I think that would
24 be appropriate.

25 MR. PURCELL: I didn't mean to forget about that,

1 we would like to have ten days or some reasonable period of
2 time to notify our dealers and give them a chance to speak
3 up.

4 SPECIAL MASTER ESSAKI: Counsel, with respect to
5 this one, before we get to Mr. Williams, which is produce the
6 dealer reported data, does not contain personal information,
7 provide the dealer ten days notice to object and be heard on
8 that?

9 MR. ROWE: Yes, that's fine with the requesting
10 party.

11 SPECIAL MASTER ESSAKI: Mr. Williams?

12 MR. WILLIAMS: Sorry to belabor it, I think I would
13 agree as for the order, but if it doesn't have this
14 information that is asserted to be subject to protection then
15 if I could just inquire what is it that they are being given
16 an opportunity to object to? Information is being produced
17 by the OEMs that is pursuant to a protective order so I don't
18 know what it is that we are protecting now.

19 MR. PURCELL: We have contractual relationships
20 with and obligations to our dealers. Our dealers consider
21 this to be extremely private and confidential information for
22 reasons of their own. They are not here other than through
23 counsel that represents a small minority of them. We don't
24 want to run afoul of any contractual obligation or just
25 frankly dealer relationship obligations, and it seems like a

1 very modest request to get a small period of objection. If
2 Mr. Williams is right and there is not any personal
3 identification information, the dealers probably won't object
4 or the objection would be overruled and the material would be
5 produced.

6 MR. WILLIAMS: Okay.

7 SPECIAL MASTER ESSHAKI: Let's give them the right
8 to object, sir. Anything else?

9 MR. PURCELL: I think other than the one open issue
10 that's it -- or the one remaining issue to be --

11 SPECIAL MASTER ESSHAKI: Well, I think there were
12 three; the one that they were discussing in the hallway and
13 two more you identified that was acceptable to your client
14 but you had to check and --

15 MR. PURCELL: Right. I was referring to the one
16 that Ms. Smedley was checking on where we don't know yet
17 whether there is a dispute, the mid-model changes.

18 SPECIAL MASTER ESSHAKI: Counsel, please identify
19 yourself.

20 MR. SHOTZBARGER: Williams Shotzbarger for the
21 truck and equipment dealer plaintiffs.

22 One bigger open issue, at least from our
23 perspective, is the issue of all-terrain vehicles and
24 side-by-side vehicles that are manufactured and/or sold by
25 Honda. I'm willing to argue that now while we wait on

1 || clarification as to the other issues.

2 SPECIAL MASTER ESSHAKI: I want to see if I have an
3 agreement here first.

4 MR. SHOTZBARGER: Sure.

5 MR. WILLIAMS: I'm not sure if it is my turn, but
6 if I could comment on the outstanding item, this is what we
7 are told to this point, we can't agree to give it up, we are
8 going to verify if we have access to different ways that
9 would give us the ability to agree to that but we are not
10 able to do that yet, so we can't agree to eliminate the VIN
11 models.

12 MR. SHOTZBARGER: Did you say can?

13 MR. WILLIAMS: Cannot agree to eliminate the VIN
14 models but we are trying to see if we may be able to through
15 other means accommodate that request.

16 SPECIAL MASTER ESSHAKI: And how long do we think
17 it will take to identify that?

18 MR. WILLIAMS: About 10 or 15 minutes.

19 SPECIAL MASTER ESSHAKI: All right. Why don't we
20 just sit down, maybe I need to hear from truck and equipment
21 dealers, and then we'll come back if we have it. If we don't
22 then we will go -- I saw counsel who was negotiating with
23 Nissan come back in the courtroom and he was smiling so I
24 don't know if he's got indigestion or if we have reached an
25 agreement.

1 MR. ELLIS: They are not mutually exclusive, but we
2 need -- we'll be ready in about 30 minutes Your Honor.

3 SPECIAL MASTER ESSAKI: Okay. Very good. Okay.
4 Let's talk to the truck and equipment dealers. Identify
5 yourself again, Counsel.

6 MR. SHOTZBARGER: Williams Shotzbarger of
7 Duane Morris for the truck and equipment dealers.

8 Special Master, we request that Special Master
9 order that all-terrain vehicles and side-by-side vehicles
10 that are manufactured and sold by Honda sold in the United
11 States are relevant to our cases, and that you order the
12 production of documents with regard to those vehicles.
13 Throughout the meet-and-confer process Honda has refused to
14 acknowledge that these vehicles are part of our cases, the
15 parties are at an impasse and this is ripe for decision by
16 you today.

17 SPECIAL MASTER ESSAKI: Are they within the
18 definition of the parts or the vehicles involved in the
19 complaints?

20 MR. SHOTZBARGER: It is our position that they are.
21 That definition within the subpoena, the definition of
22 vehicle, it appears in paragraph number 22, it specifically
23 mentions agricultural equipment, and that phrase appears --
24 in addition to the subpoena in the definition of vehicle that
25 phrase appears in our wire harnesses, bearings and occupant

1 safety systems complaints. Further than that, in our
2 radiators and starters and alternators complaint we
3 specifically say agricultural equipment including ATVs
4 designed and/or marketed for agricultural use. And if I may
5 approach, I have a picture which I would like to mark.

6 SPECIAL MASTER ESSHAKI: Please do.

7 MR. SHOTZBARGER: I'd like to mark this as Honda
8 Exhibit B.

9 SPECIAL MASTER ESSHAKI: Okay.

10 Special Master, this is a picture of a
11 side-by-side, the 2015 Honda Pioneer. This image was taken
12 off of -- you can see at the bottom hondanews.com, that's an
13 official Honda website where they release press releases and
14 images such as this one used for marketing and otherwise how
15 they can sell these vehicles.

16 Now, just so the record is clear, this vehicle
17 appears to be in a barn, there are bales of hay next to it,
18 and it is pretty clear in the back of it that Honda is
19 marketing these vehicles to farmers, to ranchers, to all
20 kinds of people who although the vehicle is not specifically
21 on a road that's in the definition of vehicle, the definition
22 of vehicle in the subpoena specifically says agricultural
23 equipment.

24 We have tried to meet and confer with Honda on this
25 issue, we wrote them a letter and we never got a formal

1 response, we brought this up on calls. We do not have any
2 information about the burden associated with Honda's
3 production of these vehicles. What we do know is that they
4 are sold by America Honda Motor Company, they are subject to
5 the subpoena, they are the only Honda entity that sells
6 vehicles in the United States, so we know they are the ones
7 selling these vehicles, and because truck and equipment
8 dealers are a serving party to the subpoena we would
9 respectfully request that you order the production of
10 documents and data related to Honda sale of these vehicles in
11 the United States.

12 SPECIAL MASTER ESSAKI: I heard you say three
13 times agricultural all-terrain vehicles?

14 MR. SHOTZBARGER: Agricultural equipment.

15 SPECIAL MASTER ESSAKI: This does not involve
16 recreational all-terrain vehicles?

17 MR. SHOTZBARGER: We would submit it does, and
18 similarly to these side-by-sides, there are also marketing
19 materials where we have seen the all-terrain vehicles are
20 marketed to ranchers and to farmers. I recall a discussion
21 the parties had last night about this issue, and certain
22 serving parties have these vehicles to get around their farms
23 and ranches.

24 SPECIAL MASTER ESSAKI: You see the commercial of
25 the all-terrain vehicles where people go off-roading in an

1 ATV. Is that included in your request?

2 MR. SHOTZBARGER: It is.

3 SPECIAL MASTER ESSHAKI: Are those vehicles being
4 produced and sold by Honda?

5 MR. SHOTZBARGER: Yes, that's within our request.
6 We would submit that those vehicles are also used on farms
7 and ranches. These vehicles, like we said in our radiators
8 complaint, our starters and alternators complaint, they are
9 designed and/or marketed for agricultural use, and I think
10 this exhibit is just one instance of that that clearly shows
11 that Honda does market these vehicles for those uses.

12 SPECIAL MASTER ESSHAKI: Mr. Purcell.

13 MR. PURCELL: So starting with the definition of
14 vehicle in the subpoena, which is controlling here, the first
15 sentence talks about vehicles that are made for use on the
16 road, that would exclude ATVs and side-by-sides. The second
17 sentence of the vehicle definition talks about certain
18 specific categories of vehicles and then has a catchall, and
19 other similar vehicles at the end of it, and I think that's
20 what counsel is relying on but, of course, Your Honor is
21 right, most ATVs and side-by-sides are not made intended use
22 for agricultural purposes, they are used for recreational
23 purposes. There is certainly nothing in the subpoena that
24 relates to recreational vehicles or would bring those
25 vehicles within the scope of the subpoena, and it would be

1 pretty difficult for Honda to disentangle which ATVs are used
2 for recreational purposes versus agricultural purposes.
3 Honda doesn't know that. Honda certainly also markets these
4 vehicles for recreational purposes, that's what people
5 typically think of when they think of ATVs.

6 A little bit about the burden and about the
7 significance of this data. The burden on Honda here is
8 significant because these vehicles are managed and the data
9 about their manufacture is kept in a different Honda
10 facility. It is not kept in Ohio with North American
11 purchasing, it is kept, I believe, in North Carolina at a
12 separate Honda facility so you are dealing with different
13 personnels, different systems, and it would be an entirely
14 new process to try to investigate those systems and how they
15 are maintained, and really this is a de minimus amount of
16 commerce. Honda has sold 4 million ATVs and side-by-sides
17 since 1989, so we are not talking about something that is
18 going to be driving any economic analysis here, this is
19 really a rounding error in terms of any regression and in
20 terms of any calculation of passthrough or damages.

21 So we think as far as striking a balance between
22 the substantial efforts Honda has already undertaken to
23 produce a reasonable amount of documents and the burden on
24 Honda, we think that in striking that balance the request for
25 ATV and side-by-side information should be denied.

1 SPECIAL MASTER ESSHAKI: Counsel, are you in the
2 anti-vibrational rubber parts and bearing cases?

3 MR. SHOTZBARGER: We are in bearings, we are not in
4 anti-vibrational rubber parts.

5 SPECIAL MASTER ESSHAKI: All right. Your response?

6 MR. SHOTZBARGER: First, with regard to the
7 definition, counsel is right, we are relying on that catchall
8 that comes at the end, other such vehicles, that's one.
9 However, like I had said, agricultural equipment is
10 specifically within the definition in paragraph 22 in the
11 subpoena.

12 Second, with regard to the burden, this is the
13 first time I have ever heard from Honda regarding the burden.
14 We have been trying to meet and confer with them, we sent
15 them letters, we never got responses. We got one
16 one-paragraph e-mail saying that it wasn't within the
17 definition. So to the extent that Honda wants to argue about
18 burden today, I would submit that that should be excluded
19 from Your Honor's consideration because this is the first
20 time we've even gotten this information from Honda that they
21 should have been giving us throughout the several, several
22 months stemming from when we were here in March and when we
23 are here today.

24 Third, with regard to the allegation that this is
25 de minimus, the truck and equipment dealer plaintiffs, we

1 have evidence that these vehicles were affected by the
2 conspiracies that are at issue in these parts cases, so we
3 would submit that regardless of how many we brought claims on
4 behalf of these affected dealers who are injured and damaged
5 and so therefore they could not be more relevant to our
6 cases, that's why we specifically put ATVs in our complaint
7 and side-by-sides because we know that they are relevant.

8 SPECIAL MASTER ESSHAKI: All right. Thank you very
9 much, Counsel.

10 Again, I'm in a position where I have to exercise
11 discretion, and I'm going to exercise discretion in favor of
12 ordering discovery for the ATVs, agricultural and
13 recreational. So, Counsel, I'm going to need you to prepare
14 a special order on that and you can piggyback on the existing
15 Honda order that simply says that with respect to this order
16 it has been extended to agricultural and recreational
17 vehicles.

18 MR. SHOTZBARGER: Just one clarification, ATVs and
19 side-by-sides?

20 SPECIAL MASTER ESSHAKI: And side-by-sides, yes.
21 Thank you.

22 MR. SHOTZBARGER: Thank you.

23 SPECIAL MASTER ESSHAKI: Counsel?

24 MR. ROWE: Your Honor, very quickly, we were
25 discussing whether we can cut a deal on taking for pricing

1 the checkpoint PowerPoint slides. Not all of my colleagues
2 are prepared to do that, so we want to leave it as is in the
3 chart where it is an open item and we will get samples and
4 then come back and let Honda know --

5 SPECIAL MASTER ESSHAKI: All right. I'm going to
6 need a closing date on that where if it is not -- just like
7 we were suggesting for some of the other parties, we have
8 some open issues, we can't simply leave the issues open, I'm
9 going to need a closing date, and if you have not resolved it
10 by that date certain what I am suggesting and requesting, you
11 don't have to adhere to my request, is that you give me a
12 short letter on the open issue that has not been resolved and
13 I will resolve it by a -- on the papers as opposed to coming
14 back for a hearing. Is that acceptable?

15 MR. ROWE: That's acceptable.

16 SPECIAL MASTER ESSHAKI: Honda?

17 MR. PURCELL: One issue I see with that, Your
18 Honor, because these are the crown jewel information that we
19 have been talking about that is going to be subject to this
20 restrictive production, it is not clear to me how counsel are
21 going to evaluate this information and whether it is
22 significant enough and certainly how long will that take. I
23 mean, there is the appeals process, and I don't know whether
24 this information is going to be produced as far as set that
25 date certain that I think we all agree it would be a good

1 thing to get this wrapped up.

2 SPECIAL MASTER ESSHAKI: Well, let me suggest that
3 what I am hearing is that with respect to the moving parties
4 there is not an agreement on whether this information should
5 be -- the information should be substituted -- the
6 agreed-upon information should be substituted across the line
7 of the moving parties, so I would assume that you are either
8 going to be able to get agreement or not within ten days, and
9 that I could have something in my hands within ten days
10 describing for me what the issue is and I can resolve it in
11 writing before you get to Judge Battani, which I think will
12 occur probably the middle of January.

13 MR. PURCELL: From my perspective, given the detail
14 that the witness went into at the deposition about these
15 documents and what's in them and how they do trace the
16 evolution of MSRP and any impact that cost has on the
17 evolution of MSRP, that seems reasonable to me. If the
18 holdup is the production of these, and I always forget what
19 they are called, the vehicle --

20 MR. ROWE: Vehicle invoice breakdown.

21 MR. PURCELL: Correct, that's something I could
22 take a minute and confer with counsel about if that's the
23 holdup. If they are looking for something beyond that Honda
24 would object to that, so I think we would need a ruling on
25 that.

1 MR. ROWE: The moving parties are just asking for
2 representative samples of the checkpoint PowerPoints and
3 representative samples of the vehicle invoice breakdown so
4 that -- and the goal, honestly, Your Honor, is to confirm for
5 ourselves that this would be sufficient information and we
6 won't need anything else, and we think that we can do that
7 analysis within the ten days that you've proposed.

8 MR. PURCELL: The question I have is how are these
9 documents going to be produced in light of Your Honor's not
10 yet entered but oral order about security measures taken for
11 price-setting documents?

12 SPECIAL MASTER ESSAKI: Suggestions on that?

13 MR. ROWE: Well, I believe we were going to
14 nominate firms, and so we could just have -- we would speed
15 up our nomination of the firms, and then Honda would produce
16 directly to those select firms.

17 MR. WILLIAMS: So treated as if the order that you
18 said you would enter had been entered.

19 SPECIAL MASTER ESSAKI: Had been entered. All
20 right.

21 MR. PURCELL: We can do that. Are there other
22 issues that are still hanging here with Honda?

23 MR. ROWE: From our perspective everything is as
24 reflected in the outline.

25 SPECIAL MASTER ESSAKI: Define our, who is our?

1 MR. ROWE: The moving parties.

2 SPECIAL MASTER ESSHAKI: Thank you.

3 MR. WILLIAMS: With one caveat. As to the
4 mid-model question that came up during the discussion, we
5 have not received the confirmation that we, end payors, can
6 forego it, so I would say if we can add that, I think we can
7 answer very soon. If ten days is when you would like it to
8 be resolved and submitted to you by, that's fine, we could
9 probably do it sooner, but at least as of right now --

10 SPECIAL MASTER ESSHAKI: I would like you to do it
11 as soon as possible.

12 MR. WILLIAMS: What I proposed would be by next
13 Wednesday we will tell you our position and see if we can
14 reach an agreement, if not we will submit the one pager,
15 whatever it is going to be, and ask you to rule on it.

16 SPECIAL MASTER ESSHAKI: I don't want to be
17 Mr. Cratchit and Christmas Eve standing over the books with a
18 candle reading your arguments.

19 MR. WILLIAMS: Nor do we want be you to be. Next
20 Wednesday we will close that out, and suggest by next Friday
21 if we have to submit something to you we will submit it to
22 you.

23 SPECIAL MASTER ESSHAKI: Have we finished all of
24 the issues on Honda?

25 MR. ROWE: Yes.

1 SPECIAL MASTER ESSHAKI: You will prepare the
2 necessary document, the order, get approval, obviously this
3 has to occur after that last hanging issue is resolved?

4 MR. ROWE: Yes.

5 SPECIAL MASTER ESSHAKI: All right. Send it to
6 Honda for their approval, include the magic language on the
7 appeal rights.

8 All right. Who is next in the box?

9 MR. HEMLOCK: Chrysler or Subaru.

10 SPECIAL MASTER ESSHAKI: All right. Young lady,
11 would you mind asking the representative of Subaru to join
12 us.

13 I think Nissan is looking for their opposing party.
14 I saw counsel for Nissan just gesturing in the window.

15 While we are waiting I will tell you a true story.
16 I was handling a really complex arbitration in my office, and
17 we had a very, very fine firm from Mississippi that was
18 defending the case. We had gone through seven days of
19 hearings and was right about this time of year, and the
20 claimant's counsel was a local firm, very well established,
21 somebody who is in this case, and we closed the hearing for
22 that day, day number seven, and I walked back to my office
23 and on my desk is a holiday basket from the plaintiffs' law
24 firm.

25 So I debated for a couple minutes. Counsel had not

1 yet left, and so I gathered them all back into the hearing
2 room and said, look, I have to disclose this to you, I just
3 went back to my desk, I found this holiday basket on my desk
4 from claimant's counsel, and I said I want you to know all I
5 do is I take that basket and put it into our social room, any
6 of our employees can have whatever is in there that they
7 want, but I wanted that disclosure made. The firm from
8 Mississippi said well, sir, you are going to be surprised at
9 the size of our basket tomorrow.

10 All right. Subaru.

11 MS. METZGER: Good afternoon, Your Honor.

12 SPECIAL MASTER ESSHAKI: An outline, please.

13 MS. METZGER: Yes.

14 SPECIAL MASTER ESSHAKI: Thank you. Again, this
15 outline will be attached as Exhibit A, Subaru Exhibit A -- it
16 is actually, to be more precise, Subaru Indiana America.

17 MS. METZGER: Subaru of Indiana America --

18 SPECIAL MASTER ESSHAKI: Subaru of Indiana America
19 Exhibit A.

20 MS. METZGER: Subaru of Indiana Automotive, Inc. I
21 was thinking of our other --

22 SPECIAL MASTER ESSHAKI: All right. It will only
23 become attached when you go through the requirements for
24 sealing it, but this will be our record of what has been
25 agreed to.

1 Now, please identify yourself for the record.

2 MS. METZGER: Kimberly Metzger for Subaru.

3 MS. SMEDLEY: Angela Smedley for the NTN defendants
4 but appearing on behalf of servicing parties.

5 SPECIAL MASTER ESSHAKI: Can you tell me what is
6 the status of your negotiations with respect to a resolution
7 of this dispute?

8 MS. SMEDLEY: We believe we have resolved all open
9 issues at this point.

10 MS. METZGER: Yes.

11 MS. SMEDLEY: So we wanted to put the terms into
12 the record. One, just --

13 SPECIAL MASTER ESSHAKI: I really don't think you
14 need to if we are going to put Exhibit A in.

15 MS. SMEDLEY: We've just covered just a few little
16 nits that we will --

17 SPECIAL MASTER ESSHAKI: That changes Exhibit A.

18 MS. SMEDLEY: Yes, just a couple small things, we
19 will resubmit this to you this afternoon.

20 MS. METZGER: There is one issue, Special Master,
21 on which we need some clarification, and that's on the rebate
22 information.

23 SPECIAL MASTER ESSHAKI: Yes.

24 MS. METZGER: That's reflected on page 2, it is the
25 first full box. We are understanding that that is, per your

earlier order, is being held in abeyance pending the order to issue at a future date.

3 SPECIAL MASTER ESSHAKI: That is correct.

4 MS. METZGER: So we would remove reference to the
5 rebate information.

6 MS. SMEDLEY: I think I will add some language
7 about the pending appeal.

8 SPECIAL MASTER ESSHAKI: Yes, feel free.

9 MS. SMEDLEY: Instead of taking it out altogether.

10 MR. WILLIAMS: Steve Williams for the end payors.

11 A question of clarification because this was what I
12 raised earlier, if a party agreed to provide something I had
13 not construed your ruling as being a means to then take that
14 back because you might have a different ruling. So I just
15 want to clarify, is that Subaru's position that you are now
16 walking back from that offer?

17 MS. METZGER: No, we are not walking back from it.
18 First of all, this was a point of discussion that was still
19 open as of yesterday, and then the Special Master made his
20 order which he made applicable to all of the orders that
21 were -- not the orders but the agreements which were to come,
22 so we understood that this was applicable in the same way
23 that it was to every other agreement that would issue.

24 MS. SMEDLEY: So, yes, we did not consider this an
25 open issue but we did understand that you had to go back to

1 find out how exactly you would locate information in the
2 vendor -- in the database.

3 MS. METZGER: Well, we did agree -- my recollection
4 of what we agreed to is to find out how the SAP database was
5 structured and what information could be gleaned, but per our
6 earlier order we explained that there is not price level data
7 in there and it may not be possible to discern what is the
8 actual rebate information within that database.

9 SPECIAL MASTER ESSHAKI: I am going to apologize
10 because I believe I have caused some confusion here about my
11 intent. I believe what's on appeal before Judge Battani is
12 the issue of OEM rebates to automobile dealer plaintiffs.

13 MS. METZGER: That was my misunderstanding then.

14 SPECIAL MASTER ESSHAKI: The issue of rebates
15 received by the OEMs from the suppliers is not the same
16 issue.

17 MS. METZGER: If that's not what the subject of the
18 agreement was or the pending order --

19 SPECIAL MASTER ESSHAKI: No, I want that clear, if
20 at the end of the year the supplier is sending a check back
21 to the OEM, it is what we used to call the 3/2/1 process,
22 three percent first year, two percent second year, one
23 percent third year, price reductions, that is not what I
24 intended my ruling to be. The ruling that I was referencing
25 that says you can't have this information only goes to the

1 OEM rebates that flow through the dealers.

2 MS. METZGER: That's not an issue in our situation.

3 SPECIAL MASTER ESSHAKI: That's not an issue, and
4 that's why I wanted this clarified, that rebates that flow
5 from the suppliers to the OEMs are discoverable despite the
6 fact that there is this appeal going on on the auto dealers
7 rebate issue.

8 MS. METZGER: Understood.

9 SPECIAL MASTER ESSHAKI: Okay.

10 MS. METZGER: So we are still trying to resolve
11 with our person at Subaru what this data will look like and
12 what's actually available, so if we could put some language
13 in there to reflect that ongoing discussion with Subaru, we
14 are not trying to not produce it if we have it but it has to
15 be some form that's useable.

16 SPECIAL MASTER ESSHAKI: Understood. What I would
17 recommend we do is I will give you -- how many days to
18 complete this, to draft --

19 MS. METZGER: Our gentleman is on vacation today,
20 he's back on Monday and hopefully --

21 SPECIAL MASTER ESSHAKI: Can we get something done
22 by Wednesday of next week?

23 MS. METZGER: Yes.

24 SPECIAL MASTER ESSHAKI: And if there is a dispute
25 you can bring it back to me in letter format and I will issue

1 a ruling based upon the letters, is that acceptable, because
2 we don't have -- I don't want to bring you back for another
3 hearing -- briefing and hearing.

4 MS. METZGER: Sure.

5 MS. SMEDLEY: Thank you for your clarification on
6 the --

7 SPECIAL MASTER ESSHAKI: Sorry that I misled not
8 just you but everybody, it just struck me. Thank you.

9 MS. METZGER: Could I ask for some clarification
10 too, Your Honor? What the actual issue is going -- how you
11 are going -- are you issuing an order?

12 SPECIAL MASTER ESSHAKI: I'm asking counsel for the
13 moving parties to draft an order that comports with this with
14 adding the caveat that you said you need to get clarified by
15 next Wednesday perhaps, submit it to you, if you approve it
16 it will come back to me, it will be electronically entered,
17 and it has to have the magic language that either side has
18 the right to appeal to Judge Battani.

19 MS. METZGER: The concern that we have with the
20 order issuing is that this agreement is the result of
21 negotiations at mediation, and if an order issues then we've
22 got a different layer of obligation than we would with a
23 negotiated mediated resolution, and the concern is that if an
24 order issues instead of an agreement then that's not what we
25 understand the result of the mediation to be.

1 MS. SMEDLEY: I don't think we expect it would
2 effect compliance with --

3 SPECIAL MASTER ESSHAKI: Are you suggesting that
4 you are prepared to enter into a stipulated -- a confidential
5 stipulated order with this attached as Exhibit A?

6 MS. METZGER: We are prepared to enter into an
7 agreement with the parties to do what we say here without
8 concessions from --

9 SPECIAL MASTER ESSHAKI: Waiving the appeal rights?

10 MS. METZGER: Without waiving appeal rights -- I'm
11 sorry.

12 SPECIAL MASTER ESSHAKI: I don't understand how you
13 enter into an agreement -- mediated agreement and still
14 retain your appeal rights?

15 MS. METZGER: We intend to do what we say here in
16 the agreement, but if an order issues then we've got a
17 different set of obligations and could be read to have
18 waived, for example, that they made a showing of good cause
19 for some of this if a dispute arises in the future with
20 regard to another case, that's our concern is that an order
21 is different from a mediated -- in our view, from a mediated
22 settlement or mediated agreement.

23 SPECIAL MASTER ESSHAKI: I would like to open this
24 up for other comment please.

25 MS. SMEDLEY: I think that's similar to this

1 document, we could indicate that this is pursuant to the
2 parties' agreement, I think that's how we start most of the
3 agreed-upon provisions.

4 SPECIAL MASTER ESSHAKI: But without an order how
5 do you get to appeal?

6 MS. SMEDLEY: And have an order but indicate that
7 you are ordering this pursuant to an agreement between the
8 parties. Does that address your concern?

9 MS. METZGER: The concern we have, and perhaps I
10 didn't state this correctly, the concern we have is that if
11 an order issues it could be read as a concession by Subaru
12 that there has been a showing of good cause for this type of
13 information if issues arise with regard to future cases. We
14 don't anticipate this is going to affect anything that we do
15 here because we intend to comply with this agreement, but the
16 force and effect of an order in our opinion is different from
17 the force and effect of a mediated agreement between us as
18 regards to what might happen in the future.

19 SPECIAL MASTER ESSHAKI: Sir.

20 MR. HEMLOCK: Adam Hemlock on behalf of the
21 Bridgestone defendants.

22 I feel very strongly we need an order for all of
23 these cases for a couple of reasons. One, there needs to be
24 consistency; two, there needs to be certainty that these
25 things are going to get done, and I just worry that the

1 distinction between an agreement and an order will somehow
2 raise -- I don't believe there is any bad faith on Subaru's
3 counsel, but I just worry that there is something we are
4 going to miss that an agreement doesn't catch that an order
5 does catch.

6 SPECIAL MASTER ESSHAKI: All right.

7 MR. HEMLOCK: As to reservation of rights I would
8 assume that could be addressed somehow.

9 SPECIAL MASTER ESSHAKI: I think counsel has
10 suggested a way out of this dilemma, which is to draft an
11 order that says this order is the result of a mediated
12 agreement and the parties are reserving their rights to
13 appeal this order and they're -- the agreement is extending
14 only to the issues that have been presented for this
15 mediation.

16 MS. METZGER: That makes sense, that would be
17 acceptable.

18 SPECIAL MASTER ESSHAKI: But no precedential
19 effect?

20 MS. METZGER: Absolutely.

21 MS. SMEDLEY: Agree. Sure.

22 SPECIAL MASTER ESSHAKI: Are we done?

23 MS. METZGER: Yes.

24 SPECIAL MASTER ESSHAKI: Counsel, thank you both,
25 you've been very cooperative.

1 MS. METZGER: I'm sorry. We did address a couple
2 wording changes, are you planning on making those?

3 MS. SMEDLEY: Yes, these are the ones I'm going to
4 make and we will resubmit.

5 MS. METZGER: They are not substantive, just
6 wording changes. Thank you very much.

7 SPECIAL MASTER ESSHAKI: Thank you very much.

8 Nissan.

9 MR. ELLIS: I believe they are ready. Let me grab
10 them from the jury room.

11 SPECIAL MASTER ESSHAKI: Very good.

12 MR. ELLIS: They need a few more minutes.

13 SPECIAL MASTER ESSHAKI: Should we then start the
14 outliers with the open issues, Chrysler?

15 Please identify yourself for the record, sir.

16 MR. KLEIN: Sheldon Klein on behalf of the Tokai
17 Rika defendants and speaking for the parties.

18 If I may, I'm going to submit to you a copy of an
19 FCA document, although it is a little more complicated than
20 the earlier ones, and I realize I left myself without one so
21 if I could return to the table for a moment?

22 SPECIAL MASTER ESSHAKI: In fact, I understand that
23 you left all of them back at the hotel room, sir. You were
24 charged with the duty of making copies, which you did, but no
25 one told you that you had to bring them.

1 MR. KLEIN: Well, that's actually more true than
2 you realize.

3 SPECIAL MASTER ESSHAKI: Thank you for your good
4 work, sir.

5 MR. KLEIN: Special Master, I just handed to you a
6 copy of a term sheet with respect to FCA, it is the version
7 that -- I submitted a version to FCA roughly 9:00 last night,
8 they came back with modifications. We haven't really had
9 time to work through it. Their modifications are not
10 acceptable in a number of respects, and I am going to suggest
11 a way forward especially in light of the fact that we have a
12 time cutoff but also because there is thorny issues and then
13 I will try to give a brief explanation of what the nature of
14 our concern is, and finally I will add to the extent that we
15 get into downstream issues Mr. Williams will be speaking to
16 them rather than myself.

17 The basic nature of what is causing heartburn for
18 the parties here is that we submitted a term sheet, and
19 unfortunately I didn't bring a copy of that with me. We
20 submitted a term sheet that to the best of my ability tried
21 to specifically describe what we understood was agreed to
22 during the mediation yesterday.

23 By way of example, we would specify they will
24 produce data from such-and-such system between years X and Y.
25 What came back to us is -- this is repeated over and over in

1 FCA's version of the term sheet, the parties accept FCA's
2 offer of production, which is defined as what was contained
3 in a series of letters plus their briefs, and by silence
4 excluding what was agreed to yesterday in the mediation.

5 You know, the concern is, A, it apparently doesn't
6 include what was agreed to or what we understood was agreed
7 to yesterday in the mediation, and, B, it leaves us to fight
8 down the road piecing together letters going back over 18 --
9 or 15 months now, and various briefs to figure out what it is
10 that they are agreeing to.

11 So we can't accept -- I don't know if their offer
12 of production, you know, what it consists of or how it
13 differs or doesn't differ from the specific parameters that
14 we understood was agreed to yesterday. Frankly, I think
15 especially in light of time considerations, we aren't going
16 to parse through this today, I mean, I'm glad to go at it but
17 I do suspect at the end of the day the best use of all of our
18 time, very much including yours, is to talk afterward amongst
19 the parties and then go to the letter brief submission on a
20 fairly tight schedule if we are unable to work that out.

21 MR. KASS: Colin Kass for FCA.

22 I just wanted to respond to that briefly. We did
23 use the language, you know, the parties accept FCA's offer of
24 production with respect to whatever category it was. Our
25 offer of production hasn't changed, it is in the briefs, and

1 it is what we agreed to yesterday. I don't believe there was
2 really anything that we've agreed to that's not reflected on
3 this. We are happy to work with them to -- if they want to
4 put the offer of production to one particular place, a new
5 place, we are happy to work with them on that, it is just
6 that they were sort of making representations as to
7 specifically what we were going to do that didn't
8 necessarily -- you know, we just didn't have the time to
9 determine whether there were some language in there that was
10 not consistent with what we had previously agreed. And my
11 understanding from the meet and confer yesterday was by and
12 large we either reached agreement as to everything on the
13 offer of production, except as to the areas that were of
14 disagreement, most of which were not resolved yesterday, and
15 that was reflected also on this term sheet.

16 So that's our position as to the term sheet. I
17 think it is largely reflective of where the parties stand,
18 and -- but I'm happy to work with them to work on additional
19 or different language, if they would like.

20 SPECIAL MASTER ESSHAKI: Mr. Williams.

21 MR. WILLIAMS: Your Honor, Steve Williams for the
22 end payors.

23 I have a slightly different perspective. I think
24 you've ruled on the motion, that will go to Judge Battani.
25 It doesn't seem like we have any agreement here, and it seems

1 that your order on the motion is the governing document at
2 this point.

3 I should say, and I'm willing to have any further
4 discussion during that process but I feel that you have
5 ruled, we will submit an order, and the next step is going to
6 be intentional objections to that order.

7 SPECIAL MASTER ESSHAKI: Mr. Kass?

8 MR. KASS: Your Honor, I mean, if they are now
9 withdrawing their entire -- their entire position going back
10 to the subpoena as written, that's their position. If your
11 order is basically enforcing the subpoena as they've written
12 it or even as they've claimed to have narrowed it but still
13 covers everything without all the discussions that we have
14 had, if that is, in fact, your order, I didn't understand
15 that to be your order, I expected there to be a FCA specific
16 order, but if that is and that obviously would be what we
17 would have to appeal, but it seems like the parties have made
18 a lot of progress and if they want to go back to square one
19 that's their choice, but then they have to realize that going
20 back to square one means that there is an unenforceable
21 subpoena on its face.

22 SPECIAL MASTER ESSHAKI: The difficulty that I'm
23 facing is that I think as identified by Mr. Klein, I can't
24 tell from this outline what has been accepted and what has
25 been rejected because the outline simply says -- the first

1 entry, transactional purchase data for defendant and
2 non-defendant suppliers, the parties accept FCA's offer of
3 production with regard to transactional purchase data. FCA
4 will make reasonable inquiry as to whether supplier searches
5 can be done by DUNS number. I don't know what FCA offer of
6 production with regard to transactional purchase data is, and
7 apparently from Mr. Klein it is contained in a series of
8 e-mails or correspondence.

9 MR. KASS: It really isn't. We put that into our
10 opposition belief, we explained exactly what our offer of
11 production was, and we addressed each of the items in dispute
12 at the time. So with respect to that -- with respect to that
13 one, it is exactly what we discussed yesterday, it is exactly
14 what is in our brief, which is they give us a list of
15 suppliers, we will pull purchasing information by suppliers,
16 and that was, in fact, the agreement and we've laid that out.

17 The only reason we referenced the other
18 correspondence was because it was attached to the brief, but
19 I think we have adequately summarized it, and I don't think
20 there is any real dispute as to the parties with regard to
21 that.

22 SPECIAL MASTER ESSHAKI: Let me say this, this
23 outline is less than adequate. Okay. It is less than
24 adequate. I cannot tell what -- I fully expected to have an
25 outline that said these are the issues that have been agreed

1 upon, Chrysler is going to produce -- Fiat Chrysler of
2 America is going to produce this information from this system
3 for this period of time for these model years. Fiat Chrysler
4 of America is going to produce annual price reductions for
5 all of their vehicles during this period of time, and if
6 there was a dispute then the disputed issue is X, and the
7 parties' position is one, and FCA's position is two.

8 That is not what we have here. This is -- there is
9 no way that I can discern any agreement, and I know we
10 reached a number of agreements in our discussions yesterday,
11 but I can't discern from this outline what they are, and
12 frankly when we started out I had a scrivener saying would
13 you please keep a record of what the agreements were so we
14 can put them into this outline, and I did not take detailed
15 notes.

16 So, Mr. Klein, how do you suggest we get around
17 this? Let me make a suggestion to you to put it this way: I
18 am suggesting that within ten days I will give -- I will give
19 the parties and Fiat Chrysler America ten days to come up
20 with a mediated agreement, the terms of a mediated agreement
21 as a result of our discussions yesterday based upon the
22 record that was kept of those discussions yesterday, and I --
23 then identify for me specifically agreed items, disagreed
24 items, positions of the respective parties on the contested
25 items.

1 MR. KLEIN: Thank you, Your Honor.

2 SPECIAL MASTER ESSHAKI: Is that acceptable?

3 MR. KLEIN: That's acceptable to us.

4 SPECIAL MASTER ESSHAKI: Mr. Kass?

5 MR. KASS: The only issue is I think we can make
6 progress on the disagreed items because we have laid them out
7 right here. I mean, the disagreed items are laid out with
8 pretty specific detail, and there is no reason why I don't
9 think we can -- we can get through them. That was our
10 understanding of what today, was that we were going to go
11 through the points. So the first disputed items are on
12 page 2, the RFQ relation information, the target prices and
13 the sourcing recommendation.

14 SPECIAL MASTER ESSHAKI: Well I look at page 1, the
15 first entry.

16 MR. KASS: The first entry is agreed to
17 effectively.

18 SPECIAL MASTER ESSHAKI: My notes says not agreed.

19 MR. KASS: Not agreed and then it says none, there
20 is no disagreement is the point.

21 SPECIAL MASTER ESSHAKI: Mr. Klein?

22 MR. KLEIN: I don't know if there is a disagreement
23 because I don't know what the offer of production is, and
24 certainly I don't think that we have an ability to enforce a
25 subpoena based on a vague notion of an offer of production,

1 and certainly, you know, in the time allowed we didn't have
2 an opportunity to go back to -- if, in fact, their position
3 is we didn't move an inch on anything yesterday and we would
4 go back to the brief and that was still their position
5 period, I certainly haven't had an opportunity to flyspeck
6 against the specific agreements that I tried to document.

7 MR. KASS: So I get that they may have concerns and
8 they may think that we actually moved somewhere yesterday as
9 to item 1, but I thought we went into yesterday with an
10 agreement or at least an understanding as to the first item,
11 and there was no further disputes. The only issue that came
12 up was the DUNS -- whether we would search for DUNS
13 information and that's reflected here that says we would, in
14 fact, inquire into that issue.

15 So there might be some questions about -- I
16 understand they have questions with how the language would
17 work in the final agreement, but the areas of dispute -- at
18 least the major areas of dispute that we discussed yesterday
19 are reflected in this, and there is no reason why we can't
20 resolve those issue.

21 MR. KLEIN: If you want to hear I'm prepared to
22 discuss target pricing, sourcing recommendations and samples
23 of nonstandard agreements, which were with respect to
24 upstream data the three areas that I understood we continued
25 to have a dispute. I will take guidance from you.

1 SPECIAL MASTER ESSHAKI: We just had time
2 constraints that this cannot be done here in court. I had
3 thought we made significant progress yesterday towards a
4 complete resolution between the moving parties and FCA on
5 what was and was not going to be produced, and as I said, I
6 didn't take detailed notes, but we had a scrivener taking
7 notes on that. What I am suggesting is that perhaps those
8 notes be transcribed and distributed to the parties and to
9 FCA's counsel and you take ten days and you reach that
10 agreement, and you come back to me only with specific items
11 that are in dispute and set forth your respective positions
12 on the dispute, and I will resolve it on the paperwork.

13 MR. KASS: Your Honor, we can do that. I do
14 believe the areas of dispute will be the ones that are listed
15 here on this term sheet, those are the ones that -- as we
16 were discussing yesterday, there were items where after the
17 parties represented their positions you said that's a
18 holdover for today, so those are the ones that are reflected
19 on this chart.

20 MR. KLEIN: You are proposing --

21 SPECIAL MASTER ESSHAKI: I heard both of you accept
22 my proposal.

23 MR. KLEIN: Yes.

24 SPECIAL MASTER ESSHAKI: Thank you very much,
25 gentlemen. I do appreciate your hard work. Ten days.

1 Nissan is finally ready?

2 MR. ELLIS: I will check again, Your Honor.

3 SPECIAL MASTER ESSHAKI: They asked me to let them
4 go first so they could get on a plane.

5 MR. ELLIS: I liked where we were two hours ago.

6 SPECIAL MASTER ESSHAKI: Let's see if they are
7 ready.

8 MR. ELLIS: They are still not ready, Your Honor.

9 SPECIAL MASTER ESSHAKI: Toyota.

10 MR. HEMLOCK: Toyota.

11 SPECIAL MASTER ESSHAKI: Thank you, Mr. Hemlock.

12 MR. HEMLOCK: Thank you.

13 SPECIAL MASTER ESSHAKI: Please identify yourself
14 for the record.

15 MR. HEMLOCK: Adam Hemlock, Your Honor, Weil,
16 Gotshal & Manges, on behalf of the Bridgestone and Calsonic
17 defendants.

18 MR. SCHAPER: Michael Schaper, Your Honor, from
19 Debevoise & Plimpton on behalf of the Toyota parties.

20 SPECIAL MASTER ESSHAKI: Excellent. Counsel, we
21 have had an opportunity to confer during our mediation
22 session yesterday, and I understand some discussions
23 continued last night, and as I recall this was one of those
24 situations where we might have to carve out some issues, hold
25 them on the side until we can get some answers, and now what

1 I have been presented was what I'm going to describe as
2 Exhibit A to the motion to compel from Toyota. It will not
3 be a part of the record unless and until it has been properly
4 sealed, but for our purposes it will further our discussion.

5 All right. Let's discuss how much agreement, what
6 do we have in agreement, where do we have disputes on
7 Exhibit A.

8 MR. HEMLOCK: Sure. Thank you, Your Honor. The
9 short answer is we have agreement on most of the issues.

10 Just very briefly, with respect to the RFQ files
11 there is that work database system that contains data
12 relating to RFQs. We have agreement on certain aspects of
13 what would be the production from that database. Where we
14 don't have agreement is the number of years of data that
15 would be produced. The parties are seeking ten years of work
16 data and Toyota has offered six, those six years to be chosen
17 by the parties within the readily available range of data.
18 We continue to negotiate on that, we will continue to work
19 that through with Mr. Schaper and try to reach a resolution.

20 The next category where we have continued
21 disagreement is with respect to parts tracking. This is the
22 data related to tracking parts into particular vehicles.
23 Here Toyota has provided certain samples of information to
24 us, and the serving parties are looking at those samples and
25 trying to determine whether they are sufficient, so that ball

1 is in our court, and we hope to get back to Toyota shortly on
2 whether that data is sufficient. If it is not, we will
3 continue to seek production of other categories of documents.
4 Toyota, of course, reserves its right to oppose those
5 efforts.

6 MR. SCHAPER: The one thing I would add to that,
7 Your Honor, is that our view is that the sample information
8 that we have provided to the parties, along with the
9 additional information that we expect to produce together,
10 will allow the parties to track parts through the process, so
11 it is all of the information together that should allow them
12 to do that. We understand that they are still considering
13 that, and we reserve our right to oppose if they make
14 additional requests.

15 SPECIAL MASTER ESSHAKI: Understood.

16 MR. HEMLOCK: Thank you. The third area is with
17 respect to sales data, this is data with respect to sales of
18 vehicles. Again, we have reached agreement on which database
19 and certain fields in the database. The dispute concerns the
20 number of years of data to be produced. The parties are
21 seeking 12 years of data from that database, this is the NVS
22 database, and Toyota has offered six. We will continue to
23 actively meet and confer on that one.

24 The last issue, Your Honor, is a bit of an umbrella
25 one, it affects several of the points -- several of the

1 categories of documents. Toyota has raised a concern that
2 any production by it of data relating to submissions of
3 quotes by non-defendant suppliers would raise certain
4 contractual confidentiality concerns. And Toyota has said
5 that -- I will let Toyota characterize it themselves, but
6 they basically said they need to get consent or would like to
7 obtain consent from those suppliers. We understand, of
8 course, that there are agreements that have confidentiality
9 provisions and we don't mean to be insensitive to those.
10 However, we believe that should be in a sense a formality if
11 Toyota wishes to provide notice to them, an opportunity to be
12 heard, of course we understand that, we are willing to wait a
13 little bit of time for them to do that, but we don't believe
14 that that issue should be a barrier to compliance with any
15 order and should not hold the process up.

16 MR. SCHAPER: Your Honor, as the defendants well
17 know, our agreements with all of our suppliers require Toyota
18 to hold their confidential information confidential, and that
19 would include the prices that we pay them for auto parts,
20 their RFQ submissions, so what we have told the parties is we
21 are willing to endeavor to get consent but if we don't have
22 consent our terms and conditions require that we cannot
23 produce their confidential information absent a
24 non-appealable court order. And presumably the parties,
25 particularly the defendants, our suppliers, would want the

same treatment afforded to them; if in some other case they
were non-defendants they wouldn't want us breaching our
obligations of confidentiality, so we think this is important
to Toyota in terms of how it deals with its suppliers, in
this case the non-defendant suppliers.

SPECIAL MASTER ESSHAKI: My view is more than willing to accept whatever supplier consents Toyota can obtain in a reasonable period of time, but I would also order that the agreements be produced provided that Toyota must notify its supplier and provide them with a minimum of ten days notice that this has been ordered to let the suppliers file any objections that they may have.

13 MR. HEMLOCK: Your Honor, may I clarify, when you
14 say the agreement to be produced, are you referring -- the --

15 SPECIAL MASTER ESSHAKI: The information.

16 MR. HEMLOCK: The discovery we are seeking?

19 MR. HEMLOCK: Okay.

25 MR. HEMLOCK: When you say ten days minimum, but

1 could we also set a maximum? In other words, I think we
2 would need some prompt certainty as to whether any of them
3 are going to oppose, and then we would have to deal with that
4 very quickly.

5 MR. SCHAPER: The one thing I would say about that,
6 Your Honor, is it is actually not entirely clear which
7 non-defendant suppliers will show up in the data pulls that
8 we are agreeing to and hopefully will agree to going forward.
9 My understanding is that there were approximately 18
10 non-defendant suppliers in the two lead parts cases for
11 Toyota, and I don't know standing here today whether all of
12 them will be in the RFQ pull or the pull of transactional
13 purchase data. So I think there is a little bit of a cart
14 and a horse issue whether we go out and try to get all of
15 them even if their confidential information may not
16 ultimately be produced, or whether we wait to see what is
17 actually in the data and then get the consents.

18 SPECIAL MASTER ESSHAKI: Mr. Hemlock?

19 MR. HEMLOCK: I guess perhaps what I would propose
20 then is we -- Toyota should perhaps proceed with the internal
21 process of going through the search which results in the
22 names and identities of the non-defendant suppliers that
23 would be at issue. If they -- at that point we obviously
24 will continue to confer with Toyota's counsel on this issue,
25 but I would think they would then promptly notify them. If

1 the order could reflect that they would have a certain number
2 of days within which they have the right to object and if
3 they don't then they have waived that right and create some
4 quick opportunity for them to raise it and we will deal with
5 it promptly at that point.

6 MR. SCHAPER: One concern I have, Your Honor, IS
7 that our agreement with suppliers says that we have the
8 ability to produce information if there is a non-appealable
9 order in place. I don't know as I stand here today whether
10 any of the non-defendant suppliers will.

11 SPECIAL MASTER ESSHAKI: I will assert that right.

12 MR. SCHAPER: Will assert that right so --

13 SPECIAL MASTER ESSHAKI: We have to wait for a
14 chair to be filled on the Supreme Court before we are going
15 to get that.

16 MR. SCHAPER: I don't know how hotly contested this
17 would be at the high court, but it may be that non-defendant
18 suppliers in the window when they have to come to court would
19 raise that issue and they may raise that issue with us when
20 we seek to consent, so I just want to make sure the parties
21 and the Special Master are aware of that.

22 SPECIAL MASTER ESSHAKI: I'm sure there is some
23 case law out there that says if there is relevant information
24 in the hands of a third party, just because the third party
25 has a confidentiality agreement with a fourth party doesn't

1 insulate that information from the needs of party litigants
2 in an ongoing lawsuit. So whether it is a non-appealable
3 order or not it's for the Court to determine whether that is
4 going to be binding.

5 So please draft an order, sir, Mr. Hemlock, working
6 as much language as you can to agree upon, allow the
7 suppliers to Toyota an opportunity to object, and if they do
8 we will have to object, we'll have to deal with it when they
9 do, but I sort of have a feeling when you are talking about
10 this type of information, the confidentiality provision, the
11 protective order that currently exists, I don't see a
12 supplier coming in here arguing at least in good faith that
13 we have a confidential agreement with Toyota, they can't
14 produce this unless there is a non-appealable order from a
15 court. I think Judge Battani can issue an order and that
16 will be fully effective.

17 MR. SCHAPER: Your Honor, may I just ask you and
18 perhaps Mr. Hemlock, what is envisioned in terms of the
19 remaining areas of dispute? Toyota is willing to and happy
20 to continue to meet and confer.

21 SPECIAL MASTER ESSHAKI: I am thinking I want a
22 resolution in ten days, and if I don't I want a letter
23 telling me what the issues are that are still in contention,
24 the respective positions on those issues of the parties, and
25 the parties' respective remedies that they want -- the

1 rulings that they want.

2 MR. SCHAPER: Understood.

3 SPECIAL MASTER ESSHAKI: And I will do it on the
4 letters, I will rule on the papers.

5 MR. HEMLOCK: That's fine, Your Honor. Thank you.

6 MR. SCHAPER: Thank you.

7 SPECIAL MASTER ESSHAKI: Guess what I'm going to
8 ask?

9 MR. ELLIS: Let me check again.

10 SPECIAL MASTER ESSHAKI: Remind them, they wanted
11 to be first.

12 MR. ELLIS: I think we are there, Your Honor.

13 SPECIAL MASTER ESSHAKI: Excellent.

14 MR. ELLIS: Abram Ellis on behalf of the Stanley
15 Electric defendants and the Diamond Electric defendants, from
16 Simpson, Thacher & Bartlett.

17 MR. CAULEY: Paul Cauley on behalf of Nissan North
18 America, Inc., with the Sedgwick law firm.

19 SPECIAL MASTER ESSHAKI: All right. Gentlemen, you
20 have an outline for me?

21 MR. ELLIS: We do, Your Honor.

22 SPECIAL MASTER ESSHAKI: We are going to -- again,
23 this is going to be referenced as Nissan North America's
24 Exhibit A to this motion, but it will not be admitted unless
25 and until the appropriate procedures for sealing it have been

1 agreed upon and followed.

2 Can you tell me the status of the negotiations
3 between the parties?

4 MR. ELLIS: I will go and you can correct anything
5 that I miss. I think we are there with respect to almost
6 everything. There are a limited number of open items, and
7 I'm happy to walk through those quickly.

8 SPECIAL MASTER ESSHAKI: All right.

9 MR. ELLIS: The first is for several categories of
10 documents and data the parties have not yet reached an
11 agreement on, which models and which model years will be
12 provided for in those productions. Nissan has offered three,
13 the parties have requested nine or ten, but we just have not
14 had time to narrow that list down, and if we don't reach
15 agreement on that issue we will be prepared to brief it in a
16 letter brief without oral argument in a time consistent with
17 your schedule.

18 SPECIAL MASTER ESSHAKI: Very good.

19 MR. CAULEY: That's agreed. We will continue to
20 talk in good faith, and if we cannot reach agreement we will
21 go with the letter brief schedule that has been discussed.

22 SPECIAL MASTER ESSHAKI: Ten days.

23 MR. ELLIS: Another open item is the availability
24 of -- the reasonable availability of data from the 2004 to
25 2008 period for the downstream sales data. It is housed --

1 my understanding is that it is housed in a different system
2 and will require some different efforts to restore the 2004
3 to 2008 data, and the parties are still in discussions on
4 that topic but if we don't reach resolution we will be
5 prepared to letter brief that issue as well.

6 SPECIAL MASTER ESSHAKI: Excellent.

7 MR. CAULEY: Agreed.

8 MR. ELLIS: The last small open issue is whether
9 Nissan will be producing a schedule of MSRPs. In the shuffle
10 it is not clear whether that information has been agreed to
11 be produced or not, we are going to discuss that further, and
12 if we need to seek that request we will brief it on the same
13 schedule.

14 SPECIAL MASTER ESSHAKI: All right.

15 MR. CAULEY: Agreed.

22 MR. ELLIS: The only clarifying note I would add,
23 Your Honor, is there was one wordsmithing edit to something
24 on your copy that we will replace with a copy that I have.

25 | SPECIAL MASTER ESSHAKI: My copy --

1 MR. ELLIS: It is handwritten but that way it will
2 make it into the final.

3 MR. CAULEY: That's fine. Obviously, Your Honor, I
4 would note with regard to the referenced exhibit that at
5 least the agreed items here is the result of mediation and
6 negotiations in formal between the parties, and from our
7 perspective that then moots the plaintiffs' motion as to
8 specific items.

9 MR. ELLIS: The only point I would add in response
10 to that is it is our understanding that you do plan to issue
11 an order that will attach as an exhibit these agreements.

12 SPECIAL MASTER ESSHAKI: I plan to issue an order
13 that -- a Nissan order that will attach that agreement, it
14 needs to be sealed, and you have to draft it.

15 MR. ELLIS: Understood, Your Honor.

16 SPECIAL MASTER ESSHAKI: Get permission from
17 counsel as well.

18 MR. ELLIS: Understood.

19 SPECIAL MASTER ESSHAKI: All right.

20 MR. CAULEY: Yes.

21 SPECIAL MASTER ESSHAKI: I think we are done. Let
22 me simply say, I am most appreciative for the hard work that
23 everybody has done in this case. I only regret that
24 Judge Battani cannot see how hard you all have worked on this
25 motion, and it is a significant motion. I think in the

1 history of the country it ranks as one of the most
2 significant motions, and I know this has all been good-faith
3 professionalism and you are all to be complimented for it.
4 Thank you, thank you very much.

5 MR. WILLIAMS: Thank you, Your Honor.

6 SPECIAL MASTER ESSHAKI: Happy holidays everybody.

7 (Proceedings concluded at 1:03 p.m.)

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CERTIFICATION

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I, Robert L. Smith, Official Court Reporter of
the United States District Court, Eastern District of
Michigan, appointed pursuant to the provisions of Title 28,
United States Code, Section 753, do hereby certify that the
foregoing pages comprise a full, true and correct transcript
taken in the matter of Automotive Parts Antitrust Litigation,
Case No. 12-2311, on Friday, December 9, 2016.

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s/Robert L. Smith

Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

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Date: 12/22/2016

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Detroit, Michigan

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